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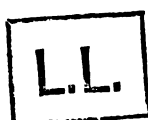


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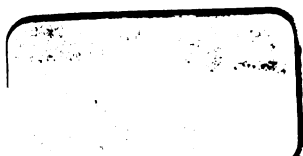
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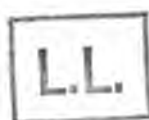
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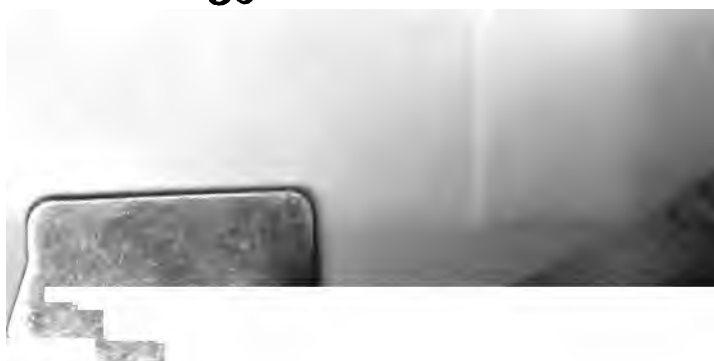




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REPORTS
OF
CASES IN LAW AND EQUITY,
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,

FROM SAVANNAH TERM, TO AMERICUS TERM, 1850,

INCLUSIVE.

THOS. R. R. COBB, REPORTER.

VOL. VIII.

No. 1

LAW BOOK

OF THE

ATHENS, CINCINNATI, COLLEGE

PRINTED BY T. M. LAMPKIN.

1850.



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E. COBB, in the Clerk's Office of the District Court for the Northern Dis-
trict of Georgia.

JUDGES AND OFFICERS OF THE SUPREME COURT.

Hon. JOSEPH HENRY LUMPKIN, Athens.

Hon. HIRAM WARNER,* Greenville.

Hon. EUGENIUS A. NISBET, Macon.

THOMAS R. R. COBB, Reporter, Athens.

ROBERT E. MARTIN, Clerk, Milledgeville.

Judges of the Superior Courts, presiding during the period of these Reports.†

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Middle District,	Hon. E. STARNES , Augusta.
Northern District,	Hon. E. BAXTER , Sparta.
Eastern District,	Hon. JAMES JACKSON , Monroe.
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Southwestern District,	Hon. LOTT WARREN , Albany.

Re-elected for six years by General Assembly of 1849.

There were several changes by the last Legislature in the Circuit Bench, but many of the decisions of the late Judges are reviewed in this volume. By Executive appointment, in place of **Hon. A. R. WRIGHT**, resigned.—
[C.]



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CASES

ARGUED AND DETERMINED

IN THE

COURT OF THE STATE OF GEORGIA,

AT SAVANNAH,

JANUARY TERM, 1850.

EDWIN M. PENDERGRAST and others, plaintiffs in error,
vs. O. FOLEY, administrator of F. Foley, deceased.

Course of Law, the general rule is, that when the Statute of Limitations begins to run, it continues to run, unless its progress is arrested by active legislative enactment.

Courts of Equity, *fraud* has been held to be an *exception* to the operation of the Statute, until the *discovery* of the fraud.

Interest of infants, as contemplated by the Act of 1817, against which the Statute of Limitations does not run, must be such an interest, as will enable them to maintain an action in their own name by their guardian; as, where the legal title to the property is vested in them.

Where the title to *personal* property of a testator or intestate, vests in his executor or administrator, and the Statute of Limitations has operated as a bar against the right of such executor or administrator to maintain an action against one who has converted it, the right of the infant *cestui que trust* such executor or administrator, will be also barred by the Statute.

Verdict, in Chatham Superior Court. Tried before Judge H. H. H. February, 1849.

Edwin M. Pendergrast, a citizen of Savannah, being in bad health, sailed for Ireland, leaving Daniel Foley as his agent to manage his property, consisting of several negroes.

groes, drays, and some real estate. The immediate management of the drays was under the control of Andrew Dixon. On the 1st November, 1830, all the negroes and drays of Pendergrast were sold at public auction by Daniel Foley, and the negroes were all purchased by him.

In 1832, the last will and testament of Patrick Pendergrast was admitted to probate, and the executors qualified under the same. The executors had a settlement with Daniel Foley, and received from him the amount of the auction sales. Foley failed to pay over the amount received from Dixon for profits of drays previous to sale at auction. Andrew Dixon intermarried with the only daughter of Daniel Foley, and after his death, on 18th April, 1842, Dixon and wife mortgaged two of these negroes, Sam and George, to Ebenezer Jenckes, for the payment of \$600. Subsequently, the mortgage was foreclosed, and the negroes sold by the Sheriff, and bought by Francis Foley, September, 1842.

In 1845, Edward Pendergrast and Philip Reily and Wife, (formerly Julia Ann Pendergrast) the legatees under the will of Patrick Pendergrast, brought an action of trover against Francis Foley for the two negroes, Sam and George. There was a verdict for the plaintiffs, and an appeal entered.

Pending the appeal, Francis Foley filed his bill on the Equity side of Court, setting forth that he was a purchaser for value without notice, and those under whom he claimed had been in adverse possession for more than four years. The bill prayed a perpetual injunction.

The answer of Pendergrast and Reily and Wife, set forth the foregoing facts; and farther, that the purchase by Daniel Foley was fraudulent and void; that Dixon had full knowledge of the fraud; that defendants were minors at the time of the sale, and but lately came of age, and had no knowledge of the fraud until within the last few years; that the executors assented to the legacy to them before the settlement, and that so soon as their assent was given, the Statute of Limitations ceased to run. The assent set up by the defendants, was the payment for board and clothing of the minors shortly after the qualification of the executors.

Upon the trial, much testimony was introduced, not necessary to be here inserted.

The Court charged the Jury at some length, to which charge, the following errors are assigned:

1st. Because the Court charged the Jury, that when notice of the auction sale, in 1830, of said slaves was brought home to the executors, that inasmuch as that sale was the fraud, the fraud being thus discovered to the executors, that the bar of the Statute commenced.

2d. Because the Court charged the Jury, that the possession of Andrew Dixon (whether he had or had not knowledge of the fraud) of these slaves, had barred the right of the defendants thereto.

3d. Because the Court charged, that the Act of 1817 did not protect the interest of the minor legatees of Patrick Pendergrast, but that the executors being barred, the said interest of the minors was also barred.

4th. Because the Court charged, that the appropriation of the profits and income of the estate of Pendergrast, to the maintenance and support of the defendants, (who were sole legatees under said will,) did not, in law, constitute such an assent on the part of the executors, as to vest the legal title to the slaves in the legatees, so as to bring them under the provision of the Act of 18th December, 1817.

5th. Because the Court charged, that the defendants were barred by the Statute of Limitations from any claim to said slaves, when neither D. Foley, Dixon, or F. Foley, had separately had possession for the length of time prescribed by the Statute.

R. M. CHARLTON and JOHN E. WARD, for plaintiffs error, cited the following authorities :

Michoud vs. Girod, 4 *Howard's Sup. Ct. Rep.* 561. 4 *Blackf.* 84. 5 *Ga. Rep.* 212. *Ward on Leg.* 364, 7. 2 *Williams on Exrs.* 984. *Matthews on Exrs.* 176, 177. *Comyn's Dig. title Administration*, c. 6. *Paramour vs. Yardley*, *Plowden*, 539, 544. *Prince*, 227, 229. *McLeod vs. Rogers*, 2 *Richardson*, 20, 22. 1 *Hall's Jurisprudence*, 225, 226. *Tillinghast's Adams*, 491.

WM. LAW, for defendant in error, cited the following authorities :

* *Harpending vs. The Dutch Church*, 16 *Peters*, 455, 493. *Parshal, adm'r vs. Davis*, 3 *Kelly*, 262. *Hovenden vs. Annesley*, 2 *Sch.*

& Lef. 630. 3 Pet. 52. 10 Pet. 223. 17 Ves. 97. 1 Kelly, 388, 538, 379. 4 McCord, 423. *Lewis on Trusts*, 24 *Law Lib.* 604. *McPherson on Infants*, 41 *Law Lib.* 540. 3 P. Wms. 309. 3 Ball & Beatty, 71. 20 Pick. 2. 1 McLean, 533. *Prince*, 578. 2 *Treadway's Const. Rep.* 549. 1 N. & McC. 296. 3 McCord, 451. 1 Bailey, 504. 1 Bailey, 505.

By the Court.—WARNER, J. delivering the opinion.

[1.] The main question involved in this case is, whether Francis Foley, the original defendant in the action of trover, was protected by the Statute of Limitations from a recovery of the two slaves, Sam and George, in a suit instituted by the legatees of Patrick Pendergrast, deceased. In November, 1830, the negroes were sold by D. Foley, at auction, as the property of Patrick Pendergrast, and purchased by D. Foley, who was the agent of Pendergrast. The negroes passed from D. Foley into the possession of one Andrew Dixon, and were mortgaged by Dixon to Jenckes, and subsequently sold, on the foreclosure of the mortgage, at Sheriff's sale, and purchased by Francis Foley, in 1842. Patrick Pendergrast died, leaving a will, by which H. Cassidy and L. O'Byrne were appointed his executors. In January, 1832, the executors of Patrick Pendergrast were qualified to execute his will. In March, 1832, the executors of Pendergrast had a settlement with D. Foley, the agent of Pendergrast, who sold the negroes at auction, in 1830, for the proceeds of the sale of the negroes, and received from said agent the amount of the sale thereof. In June, 1845, the legatees, under the will of P. Pendergrast, instituted their action of trover against the present defendant's intestate, Francis Foley, who was the purchaser of the negroes at the Sheriff's sale. Pending the action of trover, a bill was filed by the defendant in that action against the plaintiffs therein, praying for a perpetual injunction; and upon the trial of that bill in the Court below, the question in regard to the Statute of Limitations was made. From the time of the qualification of the executors of Pendergrast, and the settlement by them with D. Foley, in 1832, to the time of the commencement of the action of trover against Francis Foley, who claimed, under the title derived from Daniel Foley, more than twelve years had elapsed. The plaintiffs

action of trover were therefore barred by the Statute of limitations, provided the Statute run against them.

Court below decided that the legatees, under the will of Pendergrast, were barred by the Statute, and there was a decree made, making the injunction perpetual; whereupon, the legatees excepted, and now assign the same for error here. In a case of Law, the general rule is, that when the Statute of Limitations begins to run, it continues to run, unless its progress is stopped by some positive legislative enactment. *Ballantine on Limitations*, 60. *Peck vs. Randall*, 1 *John. Rep.* 165. *Adminis- tration of McCollough vs. Speed*, 3 *McCord's Rep.* 455. *Baring Geo. Ibid.* 452.

In Courts of Equity, fraud has been held to be an exception to the operation of the Statute, until the discovery of the fraud. *Brookbank vs. Smith*, 2 *Younge & Collier*, 58. *Hovenden & Annesley*, 2 *Schoale & Lefroy*, 634. The plaintiffs in this case insist upon two grounds to take it out of the Statute, that there was fraud in the settlement with the executor, D. Foley, and secondly, that the legatees of Pendergrast were at the time the settlement with the executors by D. Foley took place, for the negroes sold at auction by him. With respect to the alleged fraud in the settlement, the record does not show that D. Foley had received various sums of money for the testator designated as "dray money," for which he did not account; but that he did fairly account to the executors for the proceeds of the sale of the negroes, the specific property now sought to be recovered. The sale of the negroes by D. Foley, and the receipt of "dray money," were two separate and distinct transactions. The proceeds of the sale of the negroes, and the "dray money," were accounted for, and paid over to the executors, the entire proceeds of the sale of the negroes, and it would not be equitable if the legatees should receive the proceeds of the negroes, and recover them in an action of trover. If D. Foley fraudulently concealed from the executors the fact that he had in his hands effects of their testator, then, he or his legal representatives, responsible to the proper parties interested therefor, and the question of the application of the Statute to such fraudulent conduct, will naturally arise whenever a recovery of such concealed effects shall be sought in the proper tribunal. The legatees of P. Pendergrast were infants at the time of the settlement with D. Foley by the executors, for the sale of the negroes,

in 1832, and the question is, whether, inasmuch as the executors are barred by the Statute of Limitations, the infant legatees are also barred? Admitting that the sale of the negroes by D. Foley was illegal, yet, the executors knew of the sale after their qualification, and ratified it by receiving the proceeds of such sale, and the Statute commenced running against their right to sue for and recover the negroes, from the time of the settlement therefor with D. Foley, who was the purchaser of that specific portion of their testator's estate. D. Foley's title to the negroes was *adverse* to that of the executors, as is the title of those who claim under him:

[3.] But the counsel for the plaintiffs in error contend, that the legatees had an interest in the negroes, and therefore, the Statute did not run against them according to the provisions of the Act of 1817. The first section of the Act of 1817 declares, that the Statute of Limitations, when it has commenced running, shall not so operate, as to defeat the *interest* acquired by idiots, lunatics or infants, but shall cease until the removal of the disabilities of such persons, or the arrival of such infant to the age of twenty-one years. *Prince*, 579. The title to the *personal* property of the testator vested in his executors, and they had the legal right to sue for it. The legatees had not the legal right to sue for the property, until the assent of the executors. The record does not show that the executors ever assented to the legacy of these specific negroes, although the executors did make provision for the support of the infants out of their testator's estate. The appropriation of funds sufficient for the maintenance and support of the infants, during their minority, out of the estate of their testator, is not sufficient, in our judgment, to establish the fact that the executors assented to the legacy of these specific negroes, even by implication, so as to divest the title of the executors thereto, and vest the same in the legatees. The interest of the infants, contemplated by the Statute of 1817, must be such an interest as would enable them to maintain a suit, in their own names, for the property; as, where the legal title to lands is cast upon the infant heirs of the deceased ancestor. In *Wych vs. The East India Company* (3 P. Williams, 309,) it was held, that where an executor, administrator, or trustee for an infant, who neglects to sue within the time prescribed by law, the Statute of Limitations shall bind the infant. In *Hovenden vs. Lord Annesley*, Lord Redesdale says, "a *cestui que trust* is always barred by length of time operating against his trustee."

Peck v. Peck and others vs. Foley.

tee." 3 *Schreder & Lefroy*, 698. See also, *Pentland vs. Stokes*, 2 *Ball & Beatty*, 71, and *Hall vs. Bennett*, 20 *Pickering's Rep.* 2, to the same point.

[4.] If the legal title to the two negroes now in controversy, was in the testator, at the time of his death, the same vested in his executors, who alone could have maintained an action for a conversion thereof, and the Statute of Limitations commenced running against them in favor of D. Foley, and those claiming title under him, from the time of the settlement made with D. Foley, if not from the time of the qualification of the executors to execute the testator's will.

The executors were barred by the Statute, and so are the infants, their *cestui que trusts*, also barred by the Statute. If the executors have, by their negligence, injured the interests of their *cestui que trusts*, then their remedy is against them, for the injury sustained in consequence of such negligence. How far the rights of infants to real estate would be protected by the Act of 1817, we express no opinion—we leave that an open question. Our judgment is confined to such cases only, as where the title to the personal property of the testator, or intestate, vests in his legal representative.

Let the judgment of the Court below be affirmed.

No. 2.—WM. CRABTREE, plaintiff in error, vs. THOMAS GREEN, defendant in error.

- [1.] Upon a motion to set aside an award made by an umpire, the Court will not consider the irregular and improper acts of the arbitrators.
- [2.] When arbitrators disagree, and the decision devolves upon an umpire, clothed with all the powers of the arbitrators, by the submission, his duties are not limited to the determination of the questions upon which they disagreed, but extend to all the questions submitted.
- [3.] It is not a valid objection to an award, deciding that land in dispute belongs to one of the parties, that it does not direct a conveyance of the land to be executed.
- [4.] It is not necessary that an award of lands, which the submission directs to be made in writing, under the hand of the arbitrators, should be under seal.
- [5.] It is not necessary to the validity of an award, that the umpire give reasons for his decision.
- [6.] When questions of law are distinctly submitted, the decision of the arbitrators will be final, unless it appear on the award that the arbitrators intending to decide according to the law, have plainly mistaken what it is, and have acted on an erroneous rule of law.
- [7.] An umpirage will not be set aside in a case where the losing party was notified that the arbitrators had disagreed, and that the papers were in the hands of the umpire to decide, and when he was asked by the umpire if he desired him to rehear the case, he replied that he did not desire it, but was satisfied that he should proceed to determine according to the papers in his hands; on the ground, that such party was not notified of the time and place of making the award, and was thereby denied the right of appearing, examining witnesses and submitting evidence.
- [8.] An award of lands is sufficiently certain, if it describe the land by metes and bounds, land-marks and contiguous possessions, accompanied with a plat.
- [9.] An award must generally cover all the matters submitted; but if the words of the award are not co-extensive with the submission, it will still be good, if it decides all the matters actually in dispute between the parties.

Ejectment, in Chatham Superior Court. Motion to set aside award. Decided by Judge FLEMING, February, 1849.

Thomas Green brought an action of ejectment in Chatham Superior Court, against William Crabtree, for a tract of land on Hutchinson's Island. The general issue and Statute of Limitations were pleaded. On the trial, it appeared that only a portion

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of the land described was in dispute. The Jury being unable to agree, a mis-trial was awarded, and the parties then entered into the following submission :

STATE OF GEORGIA,
CHATTAHOOCY COUNTY.

} In Superior Court, May Term, 1840

JOHN DOE, ex. dem. THOMAS GREEN, vs. RICHARD ROE, i. e. Wm.
CRABTREE, tenant in possession.—Ejectment.

Upon hearing the attorneys for plaintiff and defendant in the above entitled cause, and by their mutual consent, it is ordered by this Court, that all the matters in difference between the said parties to the above entitled cause, in relation thereto, be referred to the award, order, arbitrament, final end, and determination of Dr. John A. Wragg, of the City of Savannah, State and County aforesaid, and Richard E. Cuyler, of the same place, arbitrators, mutually chosen by the said parties, to decide the matters in difference between them in said cause; and in case said arbitrators above named cannot agree, then all the said matters in difference, as aforesaid, are to be submitted to the award, arbitrament, final end and determination of Mr. Aaron Champion, of said City of Savannah, State and County aforesaid, as sole umpire, to decide the said matters in difference, and mutually chosen and selected by the said parties for that purpose; so that the said Dr. J. A. Wragg and R. E. Cuyler, so nominated and appointed, as aforesaid, as arbitrators, or the said Aaron Champion as umpire, in case the said arbitrators cannot agree, shall and do make and publish their award, or his award as umpire, in writing, under their hands, ready to be delivered to the said parties in difference, or either of them; If they or either of them shall require the same, on or before the twenty-second day of May instant, and by the like consent, it is further ordered, that the said parties shall, in all things, abide by, perform, fulfil and keep such award, so to be made, as aforesaid, and the same when so made, shall be made the judgment of this Court; that the costs of said cause shall abide the event of said award, and that the costs of the reference and award shall be in the discretion of the said arbitrators. And by the like consent, it is ordered, that the said arbitrators or umpire, shall be at liberty (if they think fit,) to examine the said parties to this suit, and their witnesses, upon oath, to be administered before some Justice of the Peace, in and for said County of Chat-

ham, or Notary Public, in and for said County, and that the said parties shall and do, before the said arbitrators or umpire, if they or either of them shall so direct and require, produce all books, deeds, plats, maps, papers, or other writings, in their or either of their custody or power, relating to the matters in difference between them in the above entitled cause. And by the like consent, it is further ordered, that neither the plaintiff nor the defendant shall, after said award shall have been made and filed, bring or prosecute any action or suit at Law or in Equity, against the said arbitrators or umpire, or either of them, or any suit at Law or in Equity, against each other, touching or concerning the said matters in difference in the above entitled cause, or any writ of error in relation thereto; and that if either party shall be affected, delay or otherwise, willfully prevent the said arbitrators or umpire, or either of them, from making the said award within the time above specified, such party shall pay to the other such costs as this Court shall think reasonable and just in the premises; or if either party shall not attend before the said arbitrators or umpire, after reasonable notice, with his witnesses and papers, relating to the matters in difference in said cause, and without such excuse as the said arbitrators or umpire shall be satisfied with and adjudge to be reasonable, then, and in such case, the said arbitrators or umpire shall and may proceed to decide the said matters in difference, *ex parte*; and the award so made, they or either of them do return within the time aforesaid to this Court, to be entered up as the judgment of this Court. And it is further ordered, by the like consent, that the testimony of all witnesses, which has heretofore been taken by commission in the above entitled cause by either party, and which is now on file in this Court, or the testimony of any other witness or witnesses, which may hereafter be taken by commission by either party in said cause, shall and may be submitted to the examination and inspection of the said arbitrators or umpire, before their said award shall be made; and the same is to be held, considered and taken by the said arbitrators or umpire as part and parcel of the testimony in said cause, upon which the said arbitrators or umpire shall be authorized to act. And it is further agreed, that all legal questions shall be submitted to said arbitrators, which arose on the late trial, including the Statute of Limitations.

Savannah, 11th May, 1848.

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The arbitrators having failed to agree on the main question at issue, each wrote out his opinion at length, and the matter was submitted, as provided, to the arbitrament of the umpire, A. Champion, who subsequently made the following award:

JOHN DOD, *vs.* THOMAS GREEN, *vs.* RICHARD REX, *i. e.* WM. CRABTREE, *tenant in possession.*—*Decree.*

Doctor John A. Wragg and Richard R. Cuyler, Esqrs. the arbitrators appointed under the order of Court in the above case, having been unable to agree, and having made their reports to me in writing, setting forth their different views, and I, in obedience to the said order of Court, having consented to act as umpire in said matter, and having examined the whole controversy and the evidences and papers of the parties and the reports of the arbitrators, do make my award and final determination of the controversy and suit between the said parties, as follows:

1st. I award and find, that the following land claimed by the said defendant, and in his possession, or over which he claims to exercise ownership, is really the property of the plaintiff, Thomas Green, that is to say, all that part of the Log Basin that is north of the back line of the wharf lots, as defined and marked out on the map hereto annexed, and to be taken as part of this award, said back line being ascertained, as I award, by a line running west from the angle of the old dam, just where the said dam commences to turn to the north; also, all of the canal, or the land covered by it west of said northern part of said Log Basin above described, to the line of the John Peter Ward tract; also, all the canal or creek, and the land covered by it south of said back line of wharf lots, until the said canal or creek leaves the main tract and enters into the tract known as the John Peter Ward tract; also, a strip of land of fifty feet in width, having for its western boundary the division line between the main tract and the John Peter Ward tract, commencing four feet east of the mouth of the creek, and fronting on the Savannah river fifty feet, and extending back the same width of fifty feet in a northern direction, until it intersects the canal or creek (or the land covered by it,) to the east of the John Peter Ward tract, the said fifty feet strip being also defined and designated on the map hereto annexed, and to be taken as part of this my award; all of the said land herein before designated, being part of the premises described in the declara-

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tion of the said plaintiff, and being situated on Hutchinson's Island, in the County of Chatham and State of Georgia aforesaid; and I award and find that the plaintiff is entitled to recover and receive the said parcels of land above described, from the said defendant, William Crabtree, and to have judgment therefor.

2d. I award and determine, that the said defendant, Wm. Crabtree, is not entitled to avail himself of the Statute of Limitations in reference to such land, or any part thereof.

3d. I award and determine, that the said plaintiff is entitled to recover and receive from the said defendant, William Crabtree, the sum of two hundred and thirty-three dollars, for the mesne profits of the said land, so in the possession of the said William Crabtree up to the present time; and to have judgment therefor.

4th. I award and determine, that all the costs (not including lawyers' fees,) attendant on and growing out of the said ejectment suit, or of the reference to arbitrators; or of this award, shall be ascertained and assessed by the Clerk of the Superior Court of Chatham County, and that the said costs shall be paid by the said defendant, William Crabtree, to the said plaintiff, who shall have judgment therefor.

5th. I award, that the plaintiff shall have liberty to use the legal means, and to take all necessary steps to carry into effect this my award.

In witness whereof, I have hereunto set my hand, this tenth day of June, in the year one thousand eight hundred and forty-eight.

In duplicate.

A. CHAMPION.

At the next term of the Court, a motion was made to set aside this award, on the following grounds:

1st. Because the arbitrators and umpire decided the case without having seen the rule of reference.

2d. Because Dr. John A. Wragg assumed as facts proved by the records, matters which do not exist, either in the records, the documentary evidence, or in the parol testimony in the case.

3d. Because said arbitrator avers in his award, that all parties acknowledge that the canal or creek, as it now exists, empties itself into the river a considerable distance west of the eastern boundary of the land of J. Peter Ward, when no such acknowledgment was ever made.

4th. Because he avers that the diagram annexed to Campfield's

testimony, is acknowledged to be incorrect in many particulars, when no such acknowledgment has ever been made.

6th. Because the said Dr. John A. Wragg only decided the western boundary, leaving the question of the northern boundary unsettled.

6th. Because Dr. J. A. Wragg, the arbitrator selected by plaintiff, exhibited his award and that made by R. R. Cuyler, Esq. to the attorney of the plaintiff, before they passed into the hands of the umpire, A. Champion, notice being then afforded to said attorney that the umpire was about to act in the premises, the same knowledge being withheld from defendant's attorneys; the first intimation of any action on the part of the umpire received by defendant's attorneys, was the information that he had made his award.

7th. Because Dr. Wragg, the arbitrator of the plaintiff, has based his award or decision on principles of equity and justice, when legal questions were alone submitted to the arbitrators.

8th. Because neither of the arbitrators have decided the question of costs, as they were required to do by the rule of reference, and because the umpire has decided the same, when he had no right to decide any questions, except those on which the arbitrators had differed.

9th. Because Aaron Champion, the umpire, undertook to decide the matters in dispute between the parties, without first giving notice to William Crabtree or his attorneys, and without examining any of the witnesses of defendant.

10th. Because the award of A. Champion, the umpire, denies to the defendant the benefit of the Statute of Limitations, without assigning any reasons therefor, and without examining the witnesses of defendant to sustain said plea.

11th. Because the award of said umpire is void, as it directs no conveyance to be made of the land awarded to plaintiff, and the award itself being insufficient for such purposes.

12th. Because the said umpire, in awarding the fee of the fifty feet of land set down in the plat accompanying his award, has given to plaintiff a right not claimed, he only claiming the use thereof, for the purpose of a canal, as is manifest from the whole testimony in the case.

13th. Because the said umpire has not decided the right of the

parties to the improvements made by defendant on the land awarded to plaintiff.

14th. Because said award is uncertain, as it does not define the metes and bounds of that portion of the Log Basin awarded to plaintiff.

15th. Because said award, in relation to all the land it professes to give to plaintiff, is uncertain, insufficient, contradictory and unintelligible, and in no case sets out the land awarded by metes and bounds.

16th. Because said umpire has not decided, according to the rule of reference, all the legal questions that arose on the trial of the case.

17th. Because in said award there are palpable errors and gross mistakes, both in law and in fact.

On the hearing before the Court below, the following affidavits were filed:

JOHN DOE, *ex. dem.* THOMAS GREEN, *vs.* RICHARD ROE, *t. c.* WM. CRABTREE, *tenant in possession.*—*Ejectment.*—*Award by Aaron Champion, Umpire.*

Personally appeared William Crabtree, the defendant in the above case, who, being duly sworn, says, that he was never notified by said Aaron Champion of the time and place, when and where he would proceed to investigate the said cause. That he, the said Aaron Champion, made his award without giving this deponent any opportunity, either in person or by his attorneys, to appear before him, during his investigation of said cause, or to have his witnesses examined.

*Sworn to before me, this seven-
teenth day of June, 1848.*

FRANCIS SORREL, J. L. C. C. C. }

WM. CRABTREE.

GEORGIA—*Chatham County.*

Before me, personally appeared, Aaron Champion, who, being duly sworn, deposeth and saith, that he is the same person who acted as umpire in the ejectment case of *Green vs. Crabtree*, and deponent further saith, that after the arbitrators had disagreed, and he had been informed of that fact, and the papers containing the different statements of the arbitrators, embodying the verbal evidence, and also the other papers, had been placed in his pos-
ses-

sion, deponent called on Captain William Crabtree, the defendant in said action, and apprised him that the papers had been handed to him, and the whole matter was now submitted to him for his final umpirage, and asked the said William Crabtree if he desired deponent, as such umpire, to re-hear the witnesses; to which the said William Crabtree replied, that he did not desire it, that he was satisfied that deponent should proceed under the written statements of the arbitrators and the other papers submitted; and that thereupon and afterwards, the said deponent proceeded to determine the said case, and to deliver his award.

*Sworn to before me, this 17th
July, 1848:*

A. CHAMPION.

LEVY HART, J. P. }

The Court overruled the motion, and the following errors have been assigned:

1st. Because His Honor decided, that he must confine his decision to the exceptions which touch the award of the umpire, without reference to the acts, irregularities or errors of Dr. Wragg, one of the arbitrators, and therefore, declined to decide the 2d, 3d, 4th, 5th, 6th and 7th exceptions made to the award.

2d. Because His Honor decided, that under the rule of reference, the decision of the umpire is not restricted to the points passed on by the arbitrators, and upon that ground, overruled the 8th exception.

3d. Because His Honor overruled the 11th exception, and decided the award good, although it directs no conveyance to be made by Crabtree to Green.

4th. Because His Honor decided it was unnecessary for the award to be under seal.

5th. Because His Honor overruled the 10th exception, and thereby sustained the award, which denied to Crabtree the benefit of the Statute of Limitations, without assigning any reasons therefor, and contrary to the law of the land.

6th. Because His Honor overruled the exception, that the umpire examined no witness of defendant, to sustain the plea of the Statute.

7th. Because His Honor overruled the 12th exception, and thereby sustained the award, giving the fee of the land to Green.

8th. Because His Honor overruled the 14th and 15th excep-

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tions, and thereby decided the award to be sufficiently certain, as to metes and bounds.

9th. Because His Honor overruled the 16th exception, and thereby decided that the umpire, by his award, has settled all the matters in difference between the parties.

10th. Because His Honor overruled the 9th exception, notwithstanding the affidavit of Wm. Crabtree.

COHEN and LAW, for plaintiff in error, cited the following authorities:

Russell on Arbitrators, 257, 258, 411, 412, 460, 462, 113. *Duer vs. Boyd*, 1 *Serg. & Rawle*, 209. 2 *Ball & Beatty*, 120. 1 *American C. L.* 458, 464. *Kent vs. Elstol*, 3 *East*. 18. 2 *Vesey, Jr.* 17. *Cowforth vs. Geer*, 2 *Vernon*, 706. *Williams, ex'r, vs. Paschal's Heirs*, 3 *Yeates*, 568. *Bond vs. Olden*, 4 *Yeates*, 243. *Kelly vs. John*, 3 *Wash. C. C. Rep.* 45. *Hunt vs. Hunt*, 1 *Wash. C. C. Rep.* 58, et seq't. *Falconer vs. Montgomery*, 4 *Dall.* 233, 271. *Russell on Arbitrators*, 230. *Johnson vs. Lancaster*, 5 *Kelly*, 45, et seq't. *Watkins vs. Norfolk*, *Ibid.*, 338. *Doe, ex dem. Madhins & Long vs. Horner & Roupell*, 8 *Adol. & Ellis*, 385. *Dodington vs. Hudson*, 1 *Bing.* 382.

CHARLTON and WARD, for defendnat in error, cited the following authorities:

Watson on Awards, 59, *Law Library*, 100, marginal page. *Jackson vs. Gager*, 5 *Cowen*, 386, '7. *Watson on Awards*, 59, *Law Library*, marg. p. 128, 289. *Payne vs. Massey*, 9. *J. B. Moore*, 666. 17 *Eng. Com. Law Rep.* 128. *Watson*, marg. p. 284, '5. *Kyd on Awards*, 114, 115. *Russell on Arbitrators*, marg. p. 631. 1 *Peters' S. C. Rep.* 228. *Watson on Awards*, 59, *Law Library*, marg. p. 134, 176 to 179, 292. *Russell on Arbitration*, marg. p. 258. *Hall vs. Lawrence*, 4 *Term Rep.* 589. *Tunno vs. Bird*, 27 *Eng. Com. Law Rep.* 111. *Sharp vs. Lipsey*, 2 *Bailey's Rep.* 113. *Russell on Arbitrators*, marg. p. 71.

By the Court.—NISBET, J. delivering the opinion.

Upon a motion to set aside the umpirage in this case, some sev-

enteen points were made against it, and all overruled by Judge FLEMING. We are to determine whether, in reference to any of these points, he committed error. I pursue the order in which the errors are alleged in the bill.

[1.] The Court is claimed to have erred in this, that he refused to consider at all, those points against the umpirage or award of the umpire, which relate to irregularities charged in the motion, against Dr. Wragg, one of the arbitrators.

The Court below was called upon to set aside the umpirage of the umpire. The arbitrators, and also the umpire, were named by the parties and designated in the submission, which was made a rule of the Court. The arbitrators proceeded to consider of the subject matters referred to them, and disagreed upon the main point in controversy, each giving a separate opinion. They, therefore, made no award. The Court was considering the judgment of the umpire, and that only. It had nothing to do with the conduct of the arbitrators. They having failed to make an award, the umpire occupied the position of a sole arbitrator. His duties were the same, which were devolved upon the arbitrators—his powers, and the limitations upon him, the same—all derived from the submission. The written opinions of the arbitrators were not before the Court as judgments. Their functions ceased upon their final disagreement, and the umpire succeeded to them. The umpire was bound to decide upon his own sole responsibility, irrespective of the acts, whether legal or not, of the arbitrators. This is all true generally; it is especially true in this case, because the rule of submission devolved upon him expressly the duty and power to decide all the matters submitted, for it declares, "and in case said arbitrators cannot agree, then all the said matters in difference, aforesaid, are to be submitted to the award, arbitrament, final end and determination of Mr. Aaron Champton, of the City of Savannah, State and County aforesaid, as sole umpire, to decide the said matters in difference, and mutually chosen and selected by the said parties for that purpose, &c." The submission is the chart of his powers, as well as those of the arbitrators. Upon this reference, there was but one judgment before the Court. The questions were made upon that judgment. The presiding Judge, in our opinion, was not at liberty to pronounce upon it, according to the conduct of strangers to it, and was, therefore, right in refusing to consider the points of irregu-

larity made in the motion to set aside the award of the umpire against Dr. Wragg, one of the arbitrators. *Kyd on Awards*, 101.

[2.] The second exception falls, necessarily, with the first. This exception asserts this proposition, to wit: "that the duties and powers of the umpire are restricted to those subject matters submitted, about which, the arbitrators differed." The umpire decided that the costs of the reference should be paid by Crabtree. About that costs, the arbitrators gave no opinion, and did not, consequently, differ; therefore, says the plaintiff in error, the judgment of the umpire ought to be set aside. But this question of costs was one of the matters submitted distinctly to the arbitrators, by the terms of the submission, and if equal power and the same duties devolved upon the umpire, which were cast upon the arbitrators, he was right in deciding it. That he was clothed with all the powers of the arbitrators, we have already seen. The submission is the evidence of what are his duties. He was not restricted to such matters as those upon which the arbitrators could not agree. He was made a judge, not to settle differences between the arbitrators, but differences between the parties. Into that covenant he came.

[3.] The eleventh exception in the motion to vacate the award, assumes that it is void, because it directs no conveyance to be made of the land awarded to the plaintiff, Green, and it is insufficient, of itself, for that purpose. The presiding Judge overruled the exception, and that decision is the third ground of error in the bill. The subject matter submitted was a strip of land on the Savannah river, being a part of a lot of two hundred acres. For this entire lot, the plaintiff brought ejectment. The umpire awarded the strip of land to the plaintiff, and it is objected that he did not direct a conveyance to be made. It was not necessary; the award is good without it. It is as effective to transfer the property, as would be a judgment in ejectment. When made, it is directed in the submission to be entered as the judgment of the Court. It is the judgment already of the forum selected by the parties to decide upon their rights. That decision, when made, is agreed between the parties, with more than the usual distinctness, to be final. This award is pleadable (and would be a prevailing plea) to any future action by the defendant against the plaintiff for the land. He is estopped, by the award, from denying the plaintiff's title. In a suit for the land, the award being plea-

ded, he would not be permitted to go into evidence of title. In point of fact, the question here was not one of title, but a question of boundaries. The plaintiff was in possession of the lot of two hundred acres sued for; his title to that lot was not controverted before the umpire. The question was, whether the strip of land awarded to the plaintiff was embraced within that lot. Although the award might not have the operation of conveying the land, yet it would estop the defendant from setting up his title to it, or disturbing the plaintiff's possession. 3 *East*, 15. 4 *Dallas*, 20. 2 *Johns. R.* 322. 1 *Wend.* 326. 9 *Coke*, 78. *Vin. Ab. Arb.* c. 5, s. 11, y. 1. *Rolle Arb. d.* 9. 6 *Pick.* 148. 4 *Ibid.* 507. 15 *Mass.* 146. By Statute in this State, a decree in Equity passes the title to land as a deed. *Hatchkiss*, 682.

[4.] The fourth error is charged to consist in this, that the award was held to be good, although not made under the seal of the umpire. The submission does not require it to be under seal. It requires it to be made in writing under the hands of the arbitrators. It was so made and returned. It pursued the submission in this particular, and that is sufficient. *Kyd*, 261 to 263.

As I have already stated, the plaintiff brought ejectment for two hundred acres of land; the defendant, by plea, set up a title to a small portion of it, under the Statute of Limitations. The subject matters, involved in the suit, were submitted to arbitration, and the rights of the defendant, under the Statute, were distinctly, *eo nomine*, submitted. It is said that the Court erred in overruling this exception, in the motion to set aside the award, to wit: "The umpire denied to the defendant the benefit of the Statute of Limitations, without assigning reasons therefor, and in denying him the benefit of the Statute, acted contrary to the law of the land." This exception presents two questions—

[5.] 1st. Can an award be set aside, because the umpire gives no reason for his judgment? 2d. Can it be set aside for a mistake of the law?

The matter is submitted for the award of the arbitrator or umpire, and not for the reasons of his judgment. He may give reasons or not. If he does not, it is no ground to impeach the award.

[6.] The general rule is this: an award cannot be impeached but for corruption, partiality or gross misbehavior in the arbitrators, or for some palpable mistake of the law or fact. Awards are treated with great liberality. The parties make the arbitrators

judges, and their judgment has much of the solemnity which attaches to the judgment of a Court of Justice. The rule above laid down, obtains in Equity. It is still more stringent at Law. At Law, an award, upon a submission which involves both law and facts, will not be opened for a mistake of the law, unless the mistake appear on the award itself, and even then, it must be in a case where the arbitrator, intending to apply the law correctly, has mistaken what the law is. To illustrate: If, in this case, the umpire had awarded in favor of the plaintiff, and proceeded to say, that the defendant had not been in possession the statutory term of ten years, and, therefore, although in possession for seven years, was not entitled to the benefit of the Statute, it would have been such a mistake, as at Law, would have invalidated the award. Parties may submit the law to arbitrators—they may clothe them with power to decide that, or to decide upon equitable principles, irrespective of the rules of law. I apprehend that no case is to be found, where the question of law being submitted distinctly, and the judgment being on that question, nakedly, that judgment has been opened because of a mistake of the law. That is this case. In *totidem verbis*, the Statute of Limitations was, in this rule, submitted, and the umpire decided on it without giving reasons. The parties agreed that the decision should be final, and went so far as to bind themselves not to bring a writ of error. *Watson on Awards*, 59 vol. *Law Library*, 289. *Payne vs. Massey*, 9 J. B. Moore, 666. 17 Eng. Com. Law Rep. 429. *Chace vs. Wetmore*, 13 East, 357. *Bouttiller vs. Thick*, 1 Dougl. & Ryd. 366. *Cramp vs. Symonds*, 7 J. B. Moore, 434. *Kyd*, 185, 237, 238. 3 *Caine's R.* 167. 14 *Johns. R.* 105. 10 *Ibid*, 146, '7. *Lucas vs. Wilson*, 2 *Burrow*, 701. 2 *Johns. R.* 62. 3 *Ibid*, 367. 3 *Atk.* 529, 644. 1 *Johns. Ch. R.* 102. 2 *Vern.* 251. 1 *Vesey, Jr.* 369. 2 *Ibid*, 22. 4 *Porter*, 70, 71.

[7.] The sixth and tenth exceptions are to the same question, and may be considered together. The substance of these exceptions is, that the Court held that it was not necessary, under the facts of this case, that the umpire should have reheard the case, notifying the defendant to appear and examine witnesses and submit evidence; and in that ruling, committed error.

It is developed in the record, that the umpire did, in fact, inform Crabtree, the defendant, that the arbitrators had disagreed, and that the opinions of the arbitrators and the papers in the case were

in his hands, and that the whole matter was submitted to him for final umpirage, and farther, that he asked Crabtree if he desired him to re-hear the witnesses, and in this inquiry, he replied that he did not desire it, and that he was satisfied that he should proceed under the written statements of the arbitrators and the other papers submitted. These facts appear by the affidavit of Mr. Champion, the umpire; in reply to which, the affidavit of Crabtree states, that the conversation between himself and the umpire, was a loose and desultory one, and that he was under the impression that he or his attorney would be summoned to attend at the time and place, when and where the umpire would make his award; and he farther states in his affidavit, that he had various title deeds to the premises in dispute in his possession, which the umpire ought to have had before him. To those statements of the defendant, the answer is obvious. If the conversation was a loose and desultory one, yet it was one which he understood—it was notice to him that the arbitrators had disagreed, and that the umpire was called upon to decide. The question was distinctly put, whether he desired the umpire to re-hear the witnesses, and the answer distinctly made, that he *did not desire it*, but was satisfied that the umpire should proceed to determine, under the written statements submitted by the arbitrators and the other papers in his hands. He had notice, and he waived his right to appear, examine witnesses, and present the title deeds in his possession. What right has he to complain? He took the risk of a decision on the statements of the arbitrators and the other papers submitted. Had he, after this conversation, and before the umpirage was made, demanded a hearing, the case would have been different. Besides, the title deeds to the premises had no relevancy to the matter in dispute. From the supplement to the bill, added by agreement of counsel—from the evidence submitted to the arbitrators, and from their written statements, it is clear that the title to the land, awarded to Green, was not in dispute, except so far as it depended on the Statute of Limitations. *Hall vs. Lawrence*, 4 T. R. 589. 1 *Baily*, S. C. R. 81; 82. 2 *Baily*, S. C. R. 113. *Kyd on Awards*, 101 to 104, and notes. I place this decision, not on the ground that it is not necessary for the umpire to give notice and re-hear the cause, but upon the ground that the party had notice and waived his right. The discussion of the other point (and it is a mooted one) is not necessary to the case. See authorities last cited,

and 4 *Dall. Penn. R.* 232, and 2 *Dall.* 271. Upon these views, we sustain the Court below on the 6th and 10th exceptions.

The seventh exception was not pressed, and requires no opinion.

[8.] The eighth seeks to convict the Court below of error, because he refused to hold that the award should be set aside, because it does not describe the land awarded to the plaintiff, with sufficient certainty. The award describes it as part of the land set forth in the plaintiff's declaration, and in the possession of the defendant, by metes and bounds, by landmarks and contiguous possessions, and a map of it accompanies the award. What more could be done? The description is minute, intelligible, and quite sufficient for identification.

[9.] The ninth and last exception, claims the umpirage bad, because the umpire did not decide upon *all* the matters submitted. The plaintiff, as before stated, being in possession of two hundred acres, less a small part of it, which was in possession of the defendant, brought ejectment for the whole, and all the matters involved in this suit were submitted. The umpire awarded the small portion, in the possession of the defendant, to the plaintiff, without saying to whom the large remainder belonged, and therefore, says the plaintiff in error, the award did not pass upon *all* the matters submitted, and is illegal. The terms of the submission embraced *all matters in difference between the parties to the suit, and in relation thereto*. Because the plaintiff's declaration went for two hundred acres, it does not necessarily follow that the parties were in difference about all of that land. A plaintiff may sue in ejectment for five thousand acres, and submit proof as to, and recover only five. But in fact, the small amount of land awarded to the plaintiff, was the only matter, so far as the lands are concerned, in difference. To whom that belonged, was the *actual* question. The possession of the remainder being in the plaintiff—his title not denied, but admitted by the defendant's counsel—it remained, after the award, precisely in *statu quo*. An award concerning that, would have been supererogatory. The rule clearly is, that the award must comprehend every thing submitted, and must not be of parcel only. If, indeed, the letter of the submission here embraced all the land, still this award is good; for the rule, as above, is subject to this limitation, to wit: If the words of the submission be more comprehensive than those of the award, yet if it do not appear that any thing else was in dispute between the par-

ties, besides what is comprehended in the award, it will be good. As, if the submission be of all actions, personal and real, and the award be of actions, personal only, it shall be presumed that no actions, real, were pending between the parties. *Kyd*, 172. *Jackson vs. Ambler*, 14 *Johns. R.* 105, 106; 8 *Coke*, 98. 19 *H.* 6, 6, *b.* *Roll. Arb. L.* 5. The land awarded to plaintiff, and that alone, was in dispute between these parties. This is manifest in this, that counsel of defendant admitted on the record, that the title to the lands was in Green, in this, that the evidence before the arbitrators was confined to the mere strip, and in this, that the statements of the arbitrators have reference to that only. The case, therefore, falls within the limitations of the rule.

Let the judgment below be affirmed.

NO. 3.—THE MAYOR, &c. SAVANNAH, plaintiffs in error, vs.
CHARLES HARTRIDGE, defendant.

- [1.] Taxation, in reference to the subject matter, is divided by writers on political economy, as well as the tax laws of all governments, into three classes—capitation, property and income; and where one or more is treated of or acted upon, the other is never intended.
- [2.] The history of the legislation of the State, in reference to a particular subject matter of taxation, may be referred to, as tending to aid in the construction to be given to the Statute; and where the State has never taxed income, the power to do so in a corporation, must appear by express words or unavoidable implication.
- [3.] A charter, authorizing a municipal corporation to tax real and personal estate, does not, necessarily, confer the right to tax income.
- [4.] In the construction of Statutes made in favor of corporations or particular persons, and in derogation of common right, care should be taken not to extend them beyond their direct terms or their clear import.
- [5.] Statutes which impose restrictions upon trade, or common occupations, must be construed strictly.
- [6.] Statutes levying taxes should be construed most strongly against the Government and in favor of the citizen.

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[7.] Revenue Statutes are, in no just sense, remedial laws, and are not, therefore, to be liberally construed.

[8.] In laws imposing taxes, if there be a real doubt whether the intention of the Act was to levy the tax, that doubt should absolve the tax-payer.

[9.] Retrospective Statutes are forbidden by the first principles of justice.

Certiorari, in Chatham Superior Court. Decided by Judge FLEMING, June, 1849.

By an ordinance of the Mayor and Council of Savannah, passed 11th November, 1842, a tax was imposed as follows: "Upon all gross income derived from commissions (whether ordinary or guaranty commissions) charged on purchases or sales of any articles whatever, on procuring or collecting freights, on receiving or forwarding goods, on all money negotiations, on the purchase or sale of stocks, or other evidences of debt, on commissions received as executor or executrix, or administrator or administratrix, and also upon the profits or income arising from the pursuit of any faculty, profession or calling, (the clergy and schoolmasters excepted) there shall be paid a tax of two and a half per cent. on the gross amount of said bill."

Under this ordinance, Charles Hartridge returned for "commissions on purchases, &c. \$11,248;" and having failed to pay the tax, execution issued. Hartridge filed an affidavit of illegality, on the ground that the ordinance was unauthorized by any of the Acts granting power to tax to the Council.

These Acts are as follows: The Act of 1787 granted power "to lay and assess one or more rate or rates, assessment or assessments, upon all and every person or persons, who do or shall inhabit, hold, use or occupy, possess or enjoy any lot, ground, houses or place, building, tenement or hereditament, in any square, street or place, within the limits of the Town of Savannah," &c. The Act of 1806 grants power "to assess and levy an annual tax on all persons and property within the said City, liable to pay tax by the general tax laws." The Act of 1825, by the seventh section, grants power to raise money "by a poll tax, or by tax and assessment, upon all real and personal estate within the limits of the City." By the fifteenth section, the Council are authorized to "tax pedlers within the jurisdictional limits of the corporation of Savannah, and to tax all and every person or persons vending

any goods, wares or merchandize in the City of Savannah or hamlets thereof."

The Mayor and Aldermen, in Council, overruled the affidavit of illegality, and Hartridge carried the case before the Superior Court, by *certiorari*. On hearing the *certiorari*, the same was sustained by the Court, and the decision of the Council reversed.

This decision is alleged as error.

S. COHEN, for plaintiff in error.

The Acts of the Legislature, viz: the Act of the 10th February, 1787, and the Act of 2d December, 1805, and the Act of 24th December, 1825, give to the corporation the right to enforce the tax in question. *Marbury & Crauford*, 121. *Clayton*, 243. *Dawson*, 464.

Defendant is a factor and vendor of goods, wares and merchandize, and therefore liable to the tax. *Clayton*, 226, 229. *Dawson*, 420. *Hotchkiss*, 131, 132. And that this is not a poll tax. 16 *Peters*, 435, 446.

Income is properly classed under the word property, and is, therefore, a subject of taxation. 2 *Blackstone*, 103; 17. *Linning vs. City Council of Charleston*, 1 *McCord*, 345, 349. *Bank of the State of Georgia vs. The Mayor and Aldermen*, *Dudley*, 130, 131, 137. *Portland Bank vs. Apthorp*, 12 *Mass.* 252, 6, 7. 16 *Peters*, 435, 445, 446. 3 *McCord*, 374, 5, 6.

The charter of the City of Charleston authorizes the City Council "to make assessments on the inhabitants of Charleston, or those who hold taxable property within the same," and it has been decided that this grant of power gives full power to tax all subjects of taxation. 1 *Nott & McCord*, 527, 28, 30. 1 *McCord*, 245, 7, 8, 9. 4 *Wheaton*, 429. 15 *Peters*, 435, 445. 3 *McCord*, 374, 5, 6.

And, finally, the Legislature, at its late session, has given a legislative interpretation to the various Acts of 1787, 1805, 1825, confirmatory of the power, and our own Supreme Court is liberal in its construction of City charters. 5 *Kelly*, 546, 561, 66, 67.

WARD (representing McALLISTER) and LAW, for defendants, cited:

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2 *Speers*, 729 to 735. 4 *Hill*, N. Y. 83, 4. 4 *Peters*, 168. 1 *Halsted*, 352. 1 *Blackf.* 336. 1 *McLean*, 41. 16 *Peters*, 447. 12 *Mass.* 252. 17 *Id.* 461. *Ang. & Ames*, 373. *Dudley*, Ga. 132. 1 *McMullan*, 413. 6 *John*, 93. 1 *Hill's S. C. Rep.* 36. 1 *McCord*, 346. 3 *McCord*, 374. 1 *Nott & McC.* 527, 8. *Statutes at Large of S. C.* pp. 366, 414, 487, 497, 529, 628. 2 *Bailey*, 671. *Frederick vs. The City Council*, 5 *Ga. Rep.* 561. 12 *Mass.* 268.

By the Court.—LUMPKIN, J. delivering the opinion.

This writ of error is brought to test the validity of an ordinance of the corporation of Savannah, laying a tax upon income; and the single question I propose to discuss is, Have the Mayor and Aldermen of that City the power, under their charter, to impose this tax?

It will not be disputed that income is a legitimate subject of taxation. The State of Georgia, in the exercise of its law-making power, may assess such a tax, and may delegate the authority to do so to a municipal corporation. The only inquiry here is, Has the right been conferred in the present instance? Now, the burden is upon the corporation to show the grant, by express words, or necessary implication. For, otherwise, it cannot be justified in the exercise of this high prerogative of sovereignty, of taxing private property without the consent of the owner.

We will proceed, then, to examine, in their chronological order, the several Acts of the Legislature, passed in reference to this subject, to ascertain what taxing power has been bestowed by the Legislature upon this corporation. There are four Statutes upon this subject; the first, the Act of 1787, (*Mar. & Crawford*, 121); the second, the Act of 1805, (*Clayton*, 243); the third, the Consolidation Act of 1825, (*Dawson*, 464); and the fourth, the Act of 1838, (*Pamphlet Laws*, p. 64.) It is conceded that these Acts are all in force; and, consequently, if the power is in either of them, it may be rightfully exercised by the Mayor and Aldermen.

The 4th section of the Act of 1787 provides, "that it shall and may be lawful for the said Wardens, or a majority of them, yearly and every year, and oftener, if occasion may require, to make, lay and assess one or more rate or rates, assessment or assess-

ments, upon all and every person or persons, who do or shall inhabit, hold, use or occupy, possess or enjoy any lot, ground, houses or place, building, tenement or hereditament, in any square, street or place, within the limits of the Town of Savannah, or hamlets thereof, for raising such sum or sums of money as the said Wardens, or a majority of them, shall, in their discretion, judge necessary for and towards carrying this Act into execution."

The construction of this Act came directly before the Convention of Judges, in the case of the Bank of the State of Georgia vs. The Mayor and Aldermen of the City of Savannah, in 1832, (*Dudley*, 136;) and that able Bench there held, that the Act of 1787, "authorized a tax *only* upon lots of ground or buildings within the City, or upon persons, in respect to this species of property, by reason of their owning, occupying or inhabiting the same." This interpretation we believe to be correct; and the procurement of the passage of the subsequent Acts of 1805, authorizing a tax upon "all persons and property," and of 1825, to tax "all real and personal estate," is conclusive that the corporation itself put this restrictive meaning upon its own powers under the previous charter. We conclude, then, that the power to tax *income* is not found in this Act.

The 1st section of the next Act, of 1805, authorizes the Mayor and Aldermen to raise and establish a regular watch, and for the purposes of paying and maintaining the same, the second section declares that they may "assess and levy an annual tax on all persons and property within the said City, liable to pay tax, by the general tax law." Here it is admitted, power is conferred to tax all persons and *property*; but the power to tax *property*, is expressly limited to *such property* as was liable to pay tax, by the general tax laws of the State. But *income* was not liable to pay tax, by the general tax laws of the State, in 1805; *nor, indeed, at any other time*. Therefore, the power to tax *income*, was not included in this grant.

The 7th section of the Act of 1825, authorizes the Mayor and Aldermen, for certain purposes therein enumerated, to raise any sum or sums of money, "by a poll tax, or by tax and assessment, upon all *real and personal estate*, within the corporate limits of the City." Does this power to tax property, generally,

here, denominated real and personal estate, confer the right to tax income?

[1.] The subject of taxation has been, very properly, divided into three classes—capitation, property and income; and this distinction is recognized, not only by all writers on political economy, but in the general tax laws of all Governments; and when one, or more, is mentioned, or treated of, the other is never intended. And the point to be decided is, not whether *income* may not, possibly, be comprehended under the general name of property, but whether such is its meaning, and such was the design of the Legislature, in this Act?

[2.] I am aware that it has been held in South Carolina, that the City Council of Charleston, under their charter, to make assessments on the inhabitants of Charleston, or those who held *taxable property* within the same, have authority to tax *income*—and very properly; for *income* is *taxable property* by the general tax laws of that State—and had been, if we mistake not, from the first Act upon the subject, in 1777, down to 1783, the year when the charter to the City of Charleston was passed. But, in Georgia, notwithstanding the mind of the Legislature has been, at each successive session, intensely occupied with this most exciting and engrossing topic, to-wit, the best mode of raising taxes; still, up to the year 1825, and even to the present period, the State has never adopted the policy of gathering taxes from pursuits and employments. And if she has not seen fit to tax the commissions of executors and administrators, in any other part of our widely extended limits, why should she delegate this power, to be exercised over this class of citizens, in the City of Savannah? I can readily conceive, that there may be local subjects of taxation, which would not apply to any other place or section, or any other portion of our people; but this is not true of callings, common to all; and to warrant such a supposition, the power thus claimed should most manifestly appear to have been delegated. Nothing short of express words or unavoidable inference, will answer the purpose. The history of the legislation in the State, in reference to the subject matter of a particular Statute, may be referred to, as tending to aid in the construction to be given to the Statute. *Henry vs. Tilson*, 17 *Vermt. R.* 479.

[3.] But when we scrutinize closely other portions of this Act, we are fully persuaded, that the Legislature did not intend to in-

clude income, under the grant to tax "real and personal estate." By subsequent sections of the Act of 1825, the regulation of taverns and granting licenses, taxing vendue masters and peddlers, and persons vending goods, wares and merchandize, in the City, are powers specifically conferred. But this would have been unnecessary, if, under the general grant to tax all real and personal estate in the previous section, the corporation had the power to tax all private business. "We apprehend it cannot be pretended," say the Convention of Judges, in the case already cited, "that under a general power to tax real and personal estate, the City acquired a right to tax offices, professions and employments of every description; and it was not the legislative understanding, as is manifested from the special authority given in the same Act, to tax particular occupations. The distinction is clear and sound between what may be properly and strictly considered property, and rights and interests which are only the sources of emoluments and profits, and from which property may be derived." *Dudley*, 137, 138.

Again. There is a *locality* given to the real and personal estate to be taxed. It must be within the corporate limits of the City—that is, *visible possessions*; and by the repetition of the same terms, in the very next section, a key is furnished to the understanding of the Legislature, in the use of the words, "real and personal estate." In construing Statutes, Courts will look to the language of the whole Act, and take it for granted, that the same expressions import the same sense, whenever they occur in the same Act, unless there be something which requires them to be used in a different meaning. Now, in the very next section (8th) power is given to the City of Savannah, and the hamlets thereof, "to purchase any *real or personal estate*, for the use and benefit of the corporation." Here, undoubtedly, *income* was not intended to be included in the expression, real and personal estate; hence, we infer, that it was not in the mind of the law-maker, when the same phraseology was employed in the preceding section. Taking the two sections together, we cannot resist the belief, that it was the design of the Legislature to authorize a tax merely on real and personal property, which was visible—which was located within the City—and which, too, was the subject matter of sale and transfer. Such are the words, in their ordinary sense, and such the spirit of the Act.

[4.] This may be thought a close construction of the charter; but when we recollect that, in the construction of Statutes made in favor of corporations or particular persons, and in derogation of common right, care should be taken not to extend them beyond their express words, or their clear import: 4 *Mass. Rep.* 145. *Id.* 473. 2 *Cowen*, 42.

[5.] And that Statutes which impose restrictions upon trade of common occupations, and which levy an excise or tax upon them, must be construed strictly: 9 *Pick.* 414.

[6.] And that Statutes, levying duties or taxes upon subjects or citizens, are to be construed most strongly against the Government, and in favor of their subjects or citizens; and their provisions are not to be extended, by implication, beyond the clear import of the language used: 3 *Story*, 369.

[7.] And that revenue laws are neither remedial Statutes nor laws founded upon any permanent public policy, and are not, therefore, to be liberally construed: *Id.*

[8.] And hence, whenever there is a just doubt, that doubt should absolve the tax-payer from his burden: *Id.*

We will hold that the Legislature intended nothing beyond what their language, in its fair and usual meaning, will indicate; and, if the terms of their enactment have not embraced the object contended for, the power is with them, by additional Act or Acts, to extend them. The construction which would confound *income* with *property* in a tax law, is quite too refined and subtle, when designed to operate upon the public at large, and where they are supposed to be used in the senses belonging to the popular language of common life and every-day business.

In construing these several Statutes, we have confined our examination to the *subject matter* only. But we must not overlook the *objects* for which the taxing power is conferred; for, while the Legislature may have been willing to grant the right to tax, for one purpose, it may have refused to bestow it for another and different object. Hence, we find that each of the three Acts which we have had under consideration, are limited as to the objects for which the tax authorized to be levied was to be imposed. The Act of 1787 empowered the assessment of the taxes therein specified, "to carry into effect such regulations as might be conducive to the good order and government of the Town of Savannah, and the hamlets thereof." The Act of 1805, was "to assess and

levy a tax for the purpose of establishing a regular watch in the City" of Savannah; and the Act of 1825 was to raise money for the use of the City, "in all matters of internal police, and general safety, as respects health, fires, City guard, salaries of officers, and any other exigencies *usual* to incorporated Cities."

Now, it is disclosed to this Court, in the record before us, that one of the main purposes of this income tax, was to meet the heavy liabilities of the City, on account of its subscription to the stock of the Central Rail Road. This is distinctly set forth in the ordinance of January, 1842, of which the ordinance of November of the same year, and a portion of which is transcribed in the bill of exceptions, is amendatory. The presiding Judge certifies that he pronounced his judgment in view of all the tax ordinances passed by the corporation. Concede, then, that the power had been given to the Mayor and Aldermen to impose an income tax for any or all of the various objects enumerated in the Acts of 1787, 1805 and 1825. Admitting, in other words, that the power was delegated over the *subject matter* of this tax, still it would not be allowable to tax income, to meet the liability of the City for its subscription to the stock of the Central Rail Road; there being neither a specific nor general grant, in any of these Acts, to that effect.

In 1838, however, the Legislature conferred on the corporation, authority to obtain money on loan, "on the faith and credit of the City, for the purpose of contributing to works of internal improvement." What does this grant imply? Not only the right to pledge the property of the City, but to resort to all the legitimate means of taxation bestowed by their charter, to maintain and redeem this "faith and credit." Still, the right to tax income, even for this purpose, has not, as we have attempted to show, been delegated, however necessary and proper it may appear to be to the City Authorities, to meet their engagements.

[9.] I have not deemed it necessary to consider the Act of the present session of the General Assembly, (1849,) explanatory of their previous legislation upon this subject, and which has been read, though not seriously relied on, by counsel in their argument for the plaintiffs in error. For, while we are among the last persons who would be inclined to impair the legislative power of the State, one of the most useful, as well as honorable, in all Governments, and would be among the foremost to support and

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construe favorably all its Acts not prohibited by paramount authority, yet *law*, from its very nature, must be confined to *subsequent* occurrences—a *rule* for *future cases*. It cannot look back, therefore, upon interests already settled, or events which have already transpired. By Mr. Justice Woodbury, in *Merrill vs. Sherburne*, 1 *New Hamp. R.* 199. See also, 7 *Johns. R.* 495. 1 *Bay*, 107. *Bacon. Statute*, 6. 7 *Mass. R.* 385. In this State, as well as in all republics, it is not the *Legislature*, however transcendent its powers, who are supreme—but the *people*—and to suppose that they may violate the fundamental law, is, as has been most eloquently expressed, “to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of delegated power may do, not only what their powers do not authorize, but what they forbid.” The law is made by the *Legislature*, but applied by the Courts. The law prescribes a new rule for new controversies, but never interferes with the past or the present, because no rule of conduct can, with consistency, operate upon what occurred before the rule itself was promulgated. *Id.*

Let the judgment below stand affirmed.

No. 4.—MOSES CURRY and others, plaintiffs in error, *vs.* ROBERT S. PILES, defendant in error.

[1.] The decrees or judgments of a Court of Equity are embraced within the Dormant Judgment Act of 1823.

Motion, in Glynn Superior Court. Decided by Judge FLEMING, April Term, 1849.

This was a motion to sue out a *fi. fa.* under the 13th Equity Rule of the Superior Courts, *nunc pro tunc*, on a decree rendered 4th December, 1838. The motion was resisted on the ground,

that the decree was for a specific sum of money, and was *dormant* under the Act of 1823. The Court refused the motion, and error is assigned thereon.

W. & W. F. LAW, for plaintiffs in error.

BARTOW & DeLYON, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] The only question presented by the record in this case is, Whether a decree of a Court of Equity for a specific sum of money is embraced within the Dormant Judgment Act of 1823.

The argument for the plaintiffs in error is, that only Common Law judgments, founded on the verdict of a Jury, as specified in the Judiciary Act of 1799, are embraced within the true intent and meaning of the Act of 1823.

The Act of 1823 is an Act to amend the 3d section of an Act, passed 19th December, 1822, entitled an Act to amend the 26th section of the Judiciary Act, passed the 16th day of December, 1799; and, also, to prevent a fraudulent enforcement of dormant judgments. A decree is the judgment or sentence of a Court of Equity. *Bouvier's Law Dictionary*, 428. 2 *Maddock's Ch. Pr.* 464.

The Act of 1823 declares, that "All judgments that have been obtained since the 19th day of December, 1822, and all judgments that may be hereafter rendered, in any of the Courts in this State, on which no execution shall be sued out, &c. within seven years from the date of the judgment, shall be void and of no effect." *Prince*, 458. The Act not only purports to be an Act to amend the 26th section of the Judiciary Act of 1799, but also to prevent a fraudulent enforcement of dormant judgments. Besides, the words of the Act are very broad and comprehensive, embracing all judgments rendered in any of the Courts of this State. According to our practice, the decree is rendered by the verdict of a Jury, and is nothing but the judgment or sentence of the Court, and we are not aware of any Statute that gives to the decree or judgment of a Court of Equity, in this State, a *lien* on the property of the defendant, but the Act of 1799. Judgments rendered by Justices' Courts, are not generally founded on the ver-

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dict of a Jury, yet such judgments have always been held to be embraced within the Dormant Judgment Act.

We think the decree mentioned in the record, being for a specific sum of money, is, in contemplation of the Act of 1823, a judgment, and is not only embraced within the words of that Act, but is also within the *mischief* which that Act intended to remedy.

Let the judgment of the Court below be affirmed.

No. 5.—MARGARET WILLIAMS, plaintiff in error, vs. ROBERT MCINTYRE, adm'r, &c. of John Wagner, deceased.

[1.] A testator bequeathed as follows: "I farther will that one hundred dollars per annum be paid out of the profits of said bakery to B. Moore, of the City of New York, for the use of my mother, Mrs. Elisabeth Wagner; and, also, the like sum of one hundred dollars, out of said profits, to my sister, Mrs. Margaret Williams, together with eighty dollars, lent by her to me in New York, with interest from date:" *Held*, that the bequest to Mrs. Williams gives her a specific sum of one hundred dollars, and not annuity of one hundred dollars.

[2.] The Judge of the Superior Court in Georgia, sitting as a Chancellor, has the power, exclusively, to administer the Law. It is the province of the Jury to find the facts, and render a decree upon the trial on the merits, and in that point of view only, may they be considered in the light of Chancellors.

In Equity, in Chatham Superior Court. Decision on demurrer, by Judge FARMING, at Chambers, July, 1849.

The bill of Margaret Williams alleged, that in 1841, John Wagner made his last will and testament, which, among other things, contained the following item:

"Item 1st. It is my will and desire, that my beloved wife and son, my sister, Mrs. Margaret Williams, and her daughter, Mary Williams; should reside in the dwelling in which I now reside, at the corner of Broughton and Jefferson-sts. in the City of Savannah, and keep up the baking business as long as it can be

made profitable, so as to pay the five per cent. discount on Aaron Sibley's notes, in the Banks of Savannah, drawn by me and indorsed by Sibley. I farther will, that one hundred dollars per annum be paid out of the profits of said bakery to B. Moore, of the City of New York, for the use of my mother, Mrs. Elizabeth Wagner, and also, the like sum of one hundred dollars, out of said profits, to my sister, Mrs. Margaret Williams, together with eighty dollars, lent by her to me in New York, with interest from date; and in case my wife and sister should disagree and wish to live separate, then, in such case, I give and bequeath to my said sister, Margaret Williams, Garden Lot No. 4, on the White Bluff road, together with all the stock and improvements thereon, to her and to her heirs and assigns, forever."

The bill farther alleged, that after the death of Wagner, the executor, Felt, paid over to her *annually*, one hundred dollars, as bequeathed in the will; that in 1847, Felt procured himself to be dismissed from the office of executor, and letters of administration, with the will annexed, were granted Robert McIntyre, who married the widow of Wagner. The bill alleged that the baking business was continued, and the profits were ample to pay complainant her annuity, but that the administrator had refused to do so; denying that the will gave her an annuity, but simply a legacy. The prayer of the bill was for an account, &c.

A demurrer was filed to this bill, for want of Equity, and after argument had thereon, the Court sustained the demurrer and dismissed the bill.

To this decision complainant excepted, and alleged error on several grounds, which reduce themselves to two—

1st. That the Court erred in its construction of the will of John Wagner, in holding that the same bequeathed to complainant a legacy and not an annuity.

2d. That the Court erred in dismissing the bill, and in deciding that, upon the hearing, the complainant would not be allowed to introduce any testimony, but the will itself; the complainant contending, that testimony was admissible for certain purposes, and, moreover, that, under our system of jurisprudence, the law and facts were properly, to be adjudicated by the Court and Jury, and not by the Judge alone.

BARNES and WILLIAMS, for plaintiff in error.

HARDEN and LAWTON, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] The bill, in this case, was filed to recover an annuity, in arrears, claimed to have been bequeathed to the complainant, Mrs. Williams, by John Wagner. It exhibits those clauses under which the complainant claims, to be as follows:

"It is my will and desire, that my beloved wife and son, my sister, Margaret Williams, and her daughter, Mary Williams, should reside in the dwelling in which I now reside, at the corner of Broughton and Jefferson streets, in the City of Savannah, and keep up the baking business as long as it can be made profitable, so as to pay the five per cent. discount on Aaron Sibley's notes, in the Banks of Savannah, drawn by me and indorsed by Sibley. I farther will, that one hundred dollars per annum be paid out of the profits of said bakery to B. Moore, of the City of New York, for the use of my mother, Mrs. Elizabeth Wagner, and also, *the like sum of one hundred dollars, out of said profits, to my sister, Mrs. Margaret Williams, together with \$80, lent by her to me in New York, with interest from date; and in case my wife and sister should disagree and wish to separate, then, in that case, I give and bequeath to my said sister, Margaret Williams, Garden Lot No. 4, on the White Bluff road, together with all the stock and improvements thereon, to her and her heirs and assigns, forever.*"

Upon demurrer, the Court below held, that Mrs. Williams took, under the will, only a legacy of one hundred dollars, and the plaintiff in error insists that this holding was erroneous, because, by the will, she is entitled to an *annuity* of one hundred dollars.

The first thing to be ascertained, in the construction of a will is, the intention of the testator. In the language of the books, that is the polar star. The intention is imperative on the Courts, unless it is in conflict with some established rule of law. If it is, the law is more imperious than the intention, and the latter will yield to the former. The law, though, in order to defeat the intention, must be clearly and decidedly in conflict with it. The Courts will studiously give effect to the intention, unless constrained by the law to disregard it. No man's will is so high in

its obligations upon the Courts as the laws of the land. If the intention could prevail against the law, then the will of a testator would make or repeal the law. The effect would be, that there would be no law to regulate the transmission of property by will. The intention is to be ascertained, primarily, from the will itself. That is, generally, the highest and best evidence of it. In most cases, it is the *only* evidence. The testator having *written* his will, the *writing* is the exponent of his intentions, and if that is clear—*if*, in the will itself, there is no ambiguity—it is solemnly obligatory upon the Court, and it can resort no where else. There are cases where it becomes the duty of the Court to resort to the facts and circumstances which surrounded the testator at the time when he made his will—to place itself in the position of the testator, and read the will in the light which that position sheds upon it. In such a case, those facts and circumstances must be proven by parol evidence. Where, too, the intention cannot be clearly ascertained, by reason of any patent ambiguity as to the thing bequeathed, or the person who shall take, the Court will hear evidence to explain such ambiguity as to the thing or person. There is no occasion here to illustrate these positions. See *Wigram on the Admission of Extrinsic Evidence in aid of the Interpretation of Wills*, 11 to 14. *Guy vs. Sharp*, 1 M. & K. 602. *Doe vs. Martin*, 1 N. & M. 624. *Holsten vs. Jumpsou*, 4 Esp. R. 189. *Brown vs. Thorndike*, 15 Pick. 400. 1 *Greenl. Ev.* §§287, 288, notes. *Hiscock vs. Hiscock*, 5 M. & W. 353 to 367. 4 *Kent*, 634, '5, and notes.

In this case, we see no ambiguity of any kind. The will of itself is clearly, conclusively demonstrative of the intention of the testator. If so, the Court below did right not to hold up the bill to the hearing. It was his duty to declare the law applicable to the will, upon the demurrer. If the cause were upon the hearing, this is not a case where parol evidence would be admissible. Then, as now, the Court would be required to construe this will according to its terms and provisions alone. This case does not fall within any exception which admits parol evidence, but, as before stated, is in itself perfectly unambiguous. That it is so, I proceed to show. The clause of Mr. Wagner's will, which contains the legacy to his sister, Mrs. Williams, (the complainant,) standing by itself, can be made to give to her nothing more than the specific sum of one hundred dollars. In the pre-

vious and immediately preceding clause, he gives an annuity of one hundred dollars to his mother, and then proceeds to say—
 “And also, the like sum of one hundred dollars, out of said profits, to my sister, Mrs. Margaret Williams, together with eighty dollars, lent by her to me in New York, with interest from date.”
 Unaided by the context, this text gives to Mrs. Williams one hundred dollars, and no more. There is not a word in it which is significant of an annuity—of an intention to give one hundred dollars *per annum*. It cannot be made to convey the idea of a *per annum* allowance, without interpolating those words, or others of equivalent meaning. That, no Court will do. Nor can the want of them be supplied by parol. Without saying more, I may safely affirm, that there never was a case determined by a Court of any authority, where the interest or estate bequeathed, has been enlarged, by parol, from a specific sum to an annuity.

To paraphrase this clause, it means thus much: “And I also will a similar sum, *that is to say*, the sum of one hundred dollars, out of the said profits, to my sister, Margaret Williams.” But the main reliance of the plaintiff in error, through his learned counsel, is, that this clause, taken in connection with the precedent bequest of an annuity to Mrs. Wagner, upon the face of the will itself, gives, also, an annuity to Mrs. Williams; and, farther, that if it does not clearly give to her an annuity, yet its connection with the precedent clause makes it ambiguous, and, therefore, the Court ought to have retained the bill to the hearing, that proof of the circumstances surrounding the testator might be had to elucidate it.

Now, in answer to these propositions, I say, first, that it is not necessary, in this case, to resort to the context in order to discover the intention of the testator. The two rules upon this subject, laid down by Mr. Wigram, and, I think, sustained by adjudicated cases, are as follows:

1. A testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless, from the context of the will, it appears that he has used them in a different sense; in which case, the sense in which he thus appears to have used them, will be the sense, in which they are to be construed.

2. When there is nothing in the context of the will, from which it is apparent that a testator has used the words in which he has

expressed himself, in any other than their strict and primary sense, and where his words, so interpreted, are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them, in such popular or secondary sense, be tendered. *Ubi. Supra.*

The strict and primary sense of the words used in the bequest to Mrs. Williams, gives her one hundred dollars, to be paid out of the profits of the bakery. The testator is presumed to have used them in their strict, primary and natural acceptation. Is there any thing in the context to resist that presumption? Is there any thing there, which makes it to appear that he used them in a different sense? Is there any thing, in short, in the previous bequest to Mrs. Wagner, which shows, that whilst he has used words which give a specific legacy of one hundred dollars, he meant to give to his sister, Mrs. Williams, an annuity of one hundred dollars? The counsel for the plaintiff in error assumes that there is. We think there is not. The legacy to Mrs. Wagner is an independent bequest. It is to a different person—it is perfect of itself—it conveys, in terms, an annuity—for its language is one hundred dollars *per annum*. It declares and it implies no sort of connection with the legacy to Mrs. Williams, and would be clearly intelligible and capable of strict execution, if there were no legacy to Mrs. Williams. But it is said that the legacy to Mrs. Williams is connected with, and relates back to, the bequest to Mrs. Wagner, and that this relation and connection shed light upon the meaning and sense of its words. Through this connection, it is argued, that the testator meant to use the words in that sense which would give to Mrs. Williams an annuity—a sense different from their strict and primary interpretation. I have already said, that this resort to the context is not necessary, and, therefore, inadmissible, because the bequest to Mrs. Williams is perfect, clear and intelligible—standing alone. It is said, however, that the connection is manifest in the use of the words, *and also*. These words are claimed to be copulative, and relate to the *amount of interest* which is given to Mrs. Wagner, to wit: an annuity. To my mind they relate to the *fact of bequeathing*. The testator no doubt meant to say, *and I also will.*

Besides, this constructive reference of these words is irreconcilable with the specifications and omissions which follow them; for the testator proceeds to specify a definite sum of money, to wit: one hundred dollars, and omits the words *per annum*, which create the annuity in the preceding bequest. Again, it is argued that the word *like*, which qualifies *sum*, means a like or similar interest—that is, *an annuity*. This word is the only one which relates back to the context, and its relation back, however unnecessary, only identifies the amount of the sum, and does not identify the amount of the estate or interest. A *like sum*, that is, a sum similar in amount to the sum bequeathed to Mrs. Wagner. It is very clear, that the testator might give to his mother and his sister, the same sum, whilst he gives that sum to one annually, and to the other but once. Again, the reference of this word to the estate given to Mrs. Wagner, as in relation to the words, *and also*, is incompatible with the specifications and omissions which follow it, in the bequest to Mrs. Williams. This verbal criticism, (and words are things very often to a very serious intent,) may serve to show that the strict and primary sense of the bequest under review, creates a clear, independent disposition of itself, and that there exists no such connection between it and the context, as makes it at all ambiguous. It does not appear, from the context, that the testator used words in a sense different from their strict and primary acceptance, and, therefore, in that acceptance, they, by the rule, must stand, whether on demurrer or at the hearing. If on demurrer, it is not necessary for the Court to look to the context for a construction of this bequest, it was not necessary to hold up the bill for a hearing; and, conceding that the Court might, as it unquestionably can, survey the whole will, in order to ascertain the construction of a given clause; yet, if upon such survey, there is found no ambiguity of any kind, in that event, equally, it would not hold up the bill. Really, this seems to me to be a plain case. This simple view seems to me to be conclusive. In the bequest to Mrs. Wagner, the testator, in so many words, leaves her one hundred dollars *per annum*. In the next clause, he gives to Mrs. Williams one hundred dollars, dropping the annuity words, *per annum*. This must have been done intentionally. If not, the testator or his scrivener was greatly at fault. He having plainly declared his intention, our duty is to give it effect.

[2.] The only other point in this case not embraced in the discussion, on the first assignment, is expressed in the assignment of errors, in the following words: "His Honor erred in dismissing said bill, when the questions of law and fact, set forth in said bill, were formally and sufficiently stated, and under our system of jurisprudence, properly to be adjudicated by the Judge and Jury, forming a Court of Chancery, and not by the Judge alone." If it is meant that, under our system, the Jury are to find the facts, and the Court to determine the law of a case in Chancery, then the proposition is a true one. If it is meant that, upon demurrer to a bill, the Court has no power, alone, to decide the law arising upon the case made by the bill, we hold the proposition untrue. The demurrer admits the truth of the case made by the bill, and puts in issue the right of the plaintiff to recover upon the law of the case made. That issue is for the Court alone. In this case the plaintiff presents the will of Mr. Wagner, and the decree which she asks demands a construction of that will. There are no equitable grounds alleged for a recovery, aside from the will. The pleadings put the construction of it in issue. The will warrants or not, the recovery. The facts of the execution, &c. are admitted. Now, I apprehend, that the construction of a will, in a case like this, where, upon the hearing, parol evidence would be inadmissible, is a question of law, for the Court exclusively. Whether parol evidence be admissible or not, is also a question of law, for the Court exclusively. If, upon the hearing of the demurrer, the Court, upon the facts charged, and upon the will itself, should believe that it is a case where evidence extraneous the will, would be received according to the rules of law, clearly it would be his duty to hold up the bill, that the facts might be proven before, and found by, the Jury. This, as before stated, is not a case of that description.

Although the exception I am now considering is somewhat ambiguous, yet it seems to me that it asserts the proposition that, under our "peculiar Chancery system," the Jury, as well as the Court, are clothed with power to judge of the law. To this proposition I unconditionally object. Our system, it is true, is, in some respects, peculiar. We have no distinct and independent Chancery Court—I wish we had. By Statute, the Superior Court is clothed with Chancery powers. The same Judge that presides in that Court as a Common Law Judge, is also the

Chancellor—the incumbent of the Woolsack and of the Bench is the same man. Our modes of proceeding are somewhat different from what they are in England, (but not essentially;) and we have made the intervention of a Jury necessary to find the facts, and to render a decree in causes in Chancery, upon a hearing on the merits; and, in this point of view, we have held them, with the Court, Chancellors. So far as the administration of the law is concerned, the Judge of the Superior Court, sitting as a Chancellor, is clothed with all the powers of a Chancellor in England. In the exercise of that power, he has no partner. The Jury have no more to do with the law of a cause in Equity, than they have at Common Law. The power and responsibility of administering the law, is with him and upon him; and the law that he is to administer, is the law which obtained in England, in Courts of Chancery, at the era of the American Revolution, except so far as it is repugnant to the Constitution, Laws and form of government of this State.

In *Beall vs. The Surviving Ex'rs of Fox*, this Court say, "When we adopted the Common Law of Great Britain, we adopted it as an entire system, so far as it is properly adapted to the circumstances of our people, and the principles of Equity as there administered, for the purpose of giving practical effect to those laws, constituted a part thereof." And again: "The Act of 1784, adopted the laws of England as adapted to our circumstances. The Act of 1799 conferred Equity powers on the Superior Courts, necessary to give to those laws a complete and practical application for the benefit of the citizens of the State, in as full and ample manner as the same existed in Great Britain, for the benefit of the subjects of that kingdom. We have not only adopted the laws of England, suited to our circumstances, but we have enacted the necessary judicial machinery to give to those laws a practical and beneficial effect; and such, we understand to be the office and duty of a Court of Equity; and such, we understand to have been the object of the Legislature of 1799, in conferring Equity powers on the Superior Courts." 4 Ga. R. 425, '6.

Let the judgment of the Court below be affirmed.

No. 6.—LEWIS DEMERE and others, plaintiffs in error, vs. ALEXANDER SCRANTON, trustees, and others, defendants.

- [1.] When the complainant or defendant refers in the bill or answer, to proceedings which have transpired in another cause, a complete copy of the record should be attached, as an exhibit; otherwise, they cannot be used on the hearing.
- [2.] Contributions to remove a general lien on the whole property, will not be allowed among volunteers, where there is another fund previously liable.
- [3.] Where the pleadings show assets in the hands of the executors, such assets are first liable for the payment of all legacies.
- [4.] One legatee who has recovered his legacy, and no more, cannot be called on to contribute to a co-legatee, the executor being solvent and admitting assets in his hands sufficient to pay the other legacy.
- [5.] A residuary legatee is not liable to refund to another legatee, unless there was an original deficiency of assets, and in cases where the payment of his legacy would amount to a devastavit.

In Equity, in Glynn Superior Court. Decision on demurrer, by Judge FLEMING, at Chambers, October, 1849.

Raymond Demere, Sr., by his last will, after several specific bequests, bequeathed the residuum of his property, one moiety to his son, Joseph Demere, and one moiety to his grand-sons, Lewis, John and Paul Demere. (For the provisions of this will, more fully, see 6 *Gz. Rep.* 102.) Joseph Demere died, leaving his wife, Mary R., his only heir, who subsequently intermarried with James Moore; James Moore died shortly thereafter, and Mary R., his wife, intermarried with Alexander Scranton. By marriage contract, the property of Mrs. Scranton was conveyed to trustees, for certain uses and trusts, unnecessary to be repeated.

During the life of Joseph Demere, by order of the Court of Ordinary, the property of Raymond Demere, deceased, was directed to be distributed among the legatees, under the will, to the exclusion of John and Rose Demere, two free persons of color, to whom a legacy and an annuity were bequeathed.

Subsequently, Lewis Demere was qualified as executor to the will of Raymond Demere, Sr. In 1843, suit, by bill in Equity, was commenced by John and Rose Demere, against Lewis Demere and John Couper, the qualified executors of Raymond Demere, deceased, for the recovery of the legacy and annuity due

them under the will, and such proceedings were had in the premises, that in 1845, a decree was rendered in favor of complainants, against the executors, for the sum of \$4,174, as well as an annuity of \$75 per annum, thenceforward. By this decree, it was adjudged that the same should be a lien upon the whole estate of Raymond Demere, dec'd. Upon this decree, execution issued.

Lewis Demere, Paul Demere and John Demere, paid off and satisfied this decree, and then filed their bill against Alexander Scranton and Edwin Moore, trustees for Mary R. Scranton, and Mary R. herself, for contribution; alleging the foregoing facts; and further, that the estate of Raymond Demere had been distributed to the residuary legatees, prior to the recovery of the said decree.

To this Bill, a general demurrer was filed, and the same was heard before Judge FLEMING, at Chambers, October, 1849.

On hearing the demurrer, counsel for defendants proposed to read the record of the proceedings in the case of John and Rose Demere *vs.* the executors of Raymond Demere. Counsel for complainants objected because the same was not made an exhibit to their bill. The Court held that it might be read—being referred to in the bill in these words, "as will more at large appear, reference being had to the proceedings in said cause, of record in the Superior Court," which the Court held was sufficient to constitute the record a portion of this bill, for the purpose of reference. This decision is excepted to, as erroneous.

The Court sustained the demurrer and dismissed the bill; holding that the pleadings and decree in the suit between Rose and John Demere and the executors of Raymond Demere, amounted to an admission of assets in the hands of the executors; that, therefore there should be an allegation of the *insolvency* of the executors and that Lewis Demere, one of the complainants, being one of the executors, in paying off the decree, merely discharged a *personal* liability, and consequently he had no interest to enforce for contribution, and that this want of interest in him was equally fatal to the other complainants.

To this decision complainants excepted, and have alleged error therein.

HARDEN and COHEN, for plaintiffs in error, cited—

Demere and others vs. Scranton and others.

1 *Story Eq. Jur.* §§, 503, 92. 2 *Binney*, 299. 6 *Bac. Abr.* 200. *Ward on Legacies*, 16, 370. 4 *Metc.* 523. 6 *Ib.* 525. 2 *Hill's Ch.* 213. 7 *Pick.* 296. 2 *John.* 243. 7 *Chancery Cases* 223. 2 *John. Ch.* 614. 3 *Mason*, 230. 2 *Greenk. Ev.* §§, 113, 114. 6 *John. Ch.* 33 to 38. 1 *Comstock*, 298. 1 *Bailey Eq.* 274, 5. *Gilmer*, 424. 4 *Dess.* 422, 439. 1 *Beavan* 235. 4 *Mylne & Craig*, 420. 1 *Sim. & Stu.* 463. 1 *Russ. & M.* 338. 3 *Mylne & Cr.* 32, 41. 2 *Powell on Devises*, 670.

LLOYD, for defendant, cited—

7 *Ga. Rep.* 136. 4 *Ib.* 556. 5 *Sm. & Mar.* 791. *Broom's Maxims*, 97. 2 *Hill Ch.* 213. 1 *Ib.* 262, 3. 2 *Ves. Sr.* 194. 25 *Law Lib.* top page, 293. 6 *Ga. Rep.* 102. 2 *P. Wms.* 296, 7. *Ward on Legacies*, 198, top page. 1 *Wms. on Ex'rs*, 495. *Toller*, 341. 2 *Br. Ch.* 306. *Story Eq. Pl.* 199, 391.

WARD, on same side, stopped by the Court.

By the Court.—LUMPKIN, J. delivering the opinion.

In the year 1828, Raymond Demere made his will, by which, after certain specific legacies, he devised one moiety of the residue of his estate to Joseph Demere, and the other moiety to Lewis, John and Paul Demere. The two-moieties of the residue so devised, were delivered over to the residuary legatees, under an order of the Court, prior to the year 1834. In the year 1843, two of the specific legatees filed a bill in Equity against the executors, for their legacies. The complainant, Lewis Demere, was one of the executors. The executors answered this bill, (calling for an account and the admission of assets) and a general decree was rendered against them, establishing the fact, that the executors, at the time of the rendition of the decree, had in their hands a sufficiency of the assets of the testator to satisfy it, and directing them to pay to complainants upwards of \$4,000. An execution having issued on this decree, the same was paid by Lewis, John and Paul Demere, who now file their bill in Equity for contribution, against Mary R. Scranton and her trustees, who have succeeded to a portion of the estate left by Joseph Demere.

To this bill the defendants filed a general demurrer, for want of equity, and alleged, at the hearing :

1st. That the payment made by the complainants, as residuary legatees, under the *f. fs.* against the executors, was voluntary ; and the complainants not being compelled or legally bound to pay the same, cannot ask for contribution.

2d. That the decree had on the original bill in Equity, binds the executors to pay the amount in said decree mentioned ; and it is not alleged in the bill filed for contribution, that the executors are insolvent or unable to pay the decree.

3d. That the pleadings and decree in the original cause, show assets in the hands of the executors ; and such assets were, and are, liable for the payment of the original decree.

4th. That a legatee who has received his legacy, is never liable to refund, for the payment of other legacies, unless the assets were originally inadequate to pay all the legacies, and there has been no waste by the executor ; and no such facts as these are stated in the present bill.

5th. That Lewis Demere, having only paid an execution against himself, has no interest whatever in this bill for contribution ; and his want of interest is fatal to the whole suit.

Upon the hearing of the demurrer, the defendants' solicitors, in their arguments, referred to the original bill in Equity of the legatees which (in the present bill) was not attached as an exhibit—the decree only, being attached—but referred to in the following words : “ as will more fully and at large appear, reference being had to the proceedings in said cause, of record in said Superior Court.” Solicitors for the complainants objected to said reference, contending that the original bill of the legatees, although so referred to in their bill, formed no part of it, for the purposes of the demurrer.

The Court overruled the objection of the complainants' solicitors. The argument proceeded and the Court sustained the demurrer and dismissed the bill ; and it is upon this statement of facts the complainants except and bring this writ of error.

[1.] Either the original bill and proceedings thereon, were a part of the present bill, or they were not. If they were, it does not lie in the mouth of the complainants to object to their use by the Court and counsel, on the argument of the demurrer. If they were not, it is evident that the bill could not have proceeded to a

hearing without them; for the decree could not have been introduced in evidence on the trial, without the other proceedings. But for the understanding that the original bill, by the manner in which it was referred to, had become incorporated in the second bill and formed part of it, the second bill would have been demurred to, and justly, on account of this omission. We hold that by reciting portions of the first bill, and directing the Court, for further and full information, to the original bill and proceedings, the Court had a right to look to those proceedings, to ascertain if there was equity in complainants' bill.

The 17th Rule of Equity Practice, requires copies of all deeds, writings and other exhibits, to be filed with the bill or answer; and declares, that no other exhibits shall be admitted, unless by order of the Court, for some special and good cause shown. 2 *Kelly*, 484. The practice, therefore, of referring to original records and papers of file in the Clerk's office, is irregular and inadmissible under this rule. Complete copies of all the proceedings in the cause should be attached.

[2.] So far as the merits of the case are involved, we must say that we cannot view it in any other light than an attempt, on the part of the executor, to extricate himself from the consequences of his failure to make proper defence to the original bill, and to avoid the effect of the decree rendered against him by reason of that neglect.

It will not be denied, that if the complainants had paid the legacies due under the will of Raymond Demere, to Rose and John Demere, and which constituted a charge upon the whole estate of the testator, that they might have filed their bill against the representatives of Joseph Demere, for contribution; and had the executors, when sued for the specific legacies, pleaded *plene administravit*, and proven on the trial of the first bill, that the property had all been distributed, and nothing retained by them to pay these legacies, the decree would have been so moulded as to have made Joseph Demere ultimately liable, at least for one moiety of the demand.

[3.] But unfortunately, perhaps, this was not only not done, but the omission can never be rectified. The record of the former recovery is, and ever must remain, *conclusive* against the executors, Lewis Demere and John Demere, that they have assets in their hands sufficient to meet the decree. Such is their admit-

sion by the pleadings, and such was the verdict of the Jury; and yet, in the face of this finding, and of the judgment of *this Court*, that both complainants and defendants, *as legatees*, were absolved from all liability, except, perhaps, in the event of the insolvency of the executors, these complainants go forward, voluntarily, and satisfy the decree rendered against the executors, and now invoke the aid of a Court of Equity to compel the heirs of Joseph Demere to account with, and refund to them, the one half of what they have paid, under these circumstances!

This very execution, which these complainants allege they have paid, was levied on the property of Joseph Demere, in the hands of Alexander Scranton, as the property of the estate of Raymond Demere, when it was solemnly adjudicated by this Court, upon writ of error, that it should be collected out of the assets in the hands of the executors, and not out of that portion of the testator's estate which had been distributed to Joseph Demere: (6 Geo. Rep. 102.) If, then, this debt could not be enforced against the legatees, how can its payment be claimed as the discharge of a common or joint liability, or the removal of a common burden or incumbrance? If Rose and John Demere could not enforce this decree against the property apportioned off to Joseph Demere, at any rate until they had prosecuted the executors to insolvency, how can the present complainants, by voluntarily paying this demand, and for which they were not responsible, be in any other or better condition?

[4.] I repeat then, that by the admission of assets by the executors, sufficient to pay these specific legacies, they have made themselves *primarily* liable for the decree; and, if *solvent*, they must be *first* looked to, at least, for payment. Joseph Demere has only received what he was entitled to, under the will of Raymond Demere; nor can he, or his representatives, be called on to refund, until all the other assets are exhausted, and the executors prosecuted, personally, to insolvency.

[5.] And even then, we apprehend, the residuary legatee would be protected, unless there was an original deficiency of assets, so as to make the payment of his legacy amount to a devastation; for, if the executors had enough, at first, to pay all the legacies, and afterwards, by wasting the assets, occasion a deficiency, in such case, the legatee who had received his legacy, would not be compelled to refund. He would only be forced to

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refund where he had received more than his share. *Ward on Legacies*, 198. *Toller on Executors*, 341. 1 P. Wms. 495. 2 Brv. Ch. R. 306.

Indeed, a more hopeless case for relief, could hardly be presented. For one of these complainants, (Lewis Demere,) is also one of the executors, who admitted assets in his hands sufficient to pay this debt, subsequent to the alleged distribution to the other legatees. He has only discharged, therefore, a personal liability and indebtedness. He might have a right to go against his co-executor for distribution. He certainly has none against these defendants.

It only remains to add, that we affirm, with great pleasure, this last sound judgment which, probably, it will ever be our privilege to review, of the very able Judge who pronounced it.

No. 7.—ISAAC CARTER, plaintiff in error, vs. JOHN STANFIELD, defendant.

- [1.] On the trial of the right of property, under our Claim Laws, the possession of the defendant in execution, after an absolute sale of the property levied on, unexplained, is *prima facie* evidence of fraud.
- [2.] Where, on the trial of the right of property in a Justice's Court, the same oath was administered to the Jury, as that administered to Special Jurors in the Superior Court: *Held*, to be no valid objection, for the reason that the oath required to be administered to Juries in Justices' Courts, on the trial of the right of property, is substantially the same as that required to be administered to Special Jurors in the Superior Court.

Certiorari, in Ware Superior Court. Decided by Judge HANSELL, December Term, 1849.

Two *f. fas.* from a Justice's Court, were levied on a stock of cattle, in possession of the defendant in *f. fa.* and a claim, by Isaac Carter, was imposed. On the trial in the Justices' Court, a bill of sale was exhibited by Carter, three years older than the

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¶. fas. The possession had never been out of the defendant. The Jury found the cattle subject, and *ten per cent.* damages.

Carter sued out a *certiorari*, on the grounds, that the verdict was unauthorized by the evidence; that the Jury had no right to give damages, and that the oath administered to the Jury was the oath of a Special Jury in the Superior Court.

On hearing the return, the Court decided, that the giving of damages was illegal; but upon their being remitted by the defendant in *certiorari*, the same be dismissed—the other grounds being overruled. To all which decision Carter filed exceptions.

Sol. Gen. GAULDEN, for plaintiff in error.

COLE, for defendant.

By the Court.—WARNER, J. delivering the opinion.

This case came before the Court below, on a *certiorari* from a Justice's Court. Two grounds of error were specified in the petition for *certiorari*—First, that the Jury in the Justice's Court ought not to have found the property subject to the executions, under the evidence before them; and, secondly, that the oath administered to the Jury, by the Justice, was illegal, and not the oath required by the Statute.

[1.] The claimant introduced his bill of sale for the cattle, from the defendant in execution. The plaintiff proved, that the property claimed had been in the possession of the defendant in execution, from the time of the execution of the bill of sale to the claimant, up to the time of the levy of the executions thereon. In *Peck vs. Land*, (2 *Kelly*, 1,) this Court held, that the possession of the property remaining in the vendor, after an absolute sale, was *prima facie* evidence of fraud, but subject to explanation. Here, the possession was unexplained, and the Jury rightly found the property subject to the execution.

[2.] The oath administered to the Jury, by the Justice, was the same as administered to a Special Jury in the Superior Court. By the 9th section of the Act of 1811, prescribing the form of the oath to be administered to the Jury in a Justice's Court, for the trial of the right of property, the same oath is required as that administered to Special Jurors in the Superior Court.

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Prince, 505. As to the form of the oath administered to Special Jurors, *see Prince*, 437. The Jury found the property subject to the execution, and ten per cent. damages. The plaintiff in execution remitted the damages, and the Court below dismissed the *certiorari*, and we affirm the judgment of the Court below.

No. 8.—ANTHONY PHILLIPS, plaintiff in error, *vs.* DANIEL R. DODGE, defendant in error.

- [1.] The cause of action in this case is not within the Act of 1847, entitled "An Act to simplify and curtail pleadings at Law."
- [2.] A declaration upon notes for the payment of specific articles of property: *Held* to be bad, without an averment of the value of those articles, at the maturity of the notes, and that the notes, being offered in evidence, were properly rejected, because of a variance between the allegations and proof.
- [3.] *Held*, further, that at Common Law, after the cause has gone to the Jury, such a declaration is not amendable so as to admit the notes in evidence.

Action on notes, in Camden Superior Court. Tried before Judge H. R. JACKSON, November Term, 1849.

Phillips brought an action against Dodge, under the Act of 1847, alleging that he was indebted to plaintiff the sum of \$100, besides interest on two promissory notes, dated 16th September, 1845, and due 1st September, 1846. There was annexed a copy of the notes, which were as follows:

"On the first day of September next, I promise to pay A. Phillips, or bearer, fifteen head of gentle, two year old, spayed sows and barrows, it being for value received of him, this 16th September, 1845.

[Signed,]

DANIEL R. DODGE."

The other note was an exact copy.

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No defence was entered, and judgment, by default, was taken at the first term. On the trial, the presiding Judge ruled out the notes, on the ground that they were not described in the petition, and no allegation was made of the value of the specific articles in which the notes were payable.

Counsel for plaintiff then moved to amend, by adding the necessary description and allegation, which motion was refused.

These decisions are alleged to be erroneous.

W. B. GAULDEN, for plaintiff in error.

W. B. FLEMING, for defendant.

By the Court.—NISKER, J. delivering the opinion.

[1.] As the declaration in this case is very brief, I submit a copy. It is in the following words:

GEORGIA, }
CAMDEN COUNTY. } *To the Superior Court of said County:*

The petition of Anthony Phillips sheweth, that Daniel R. Dodge, of said County, is indebted to him in the sum of one hundred dollars, besides interest, on two written promises, dated the sixteenth day of September, eighteen hundred and forty-five, and due the first day of September, 1846, which said two written promises the said Daniel R. Dodge refuses to pay; wherefore, your petitioner prays process may issue, requiring the said Daniel R. Dodge to be and appear at the next Superior Court of said County, to answer your petitioner's complaint.

WM. B. GAULDEN, *Attorney for Petitioner.*

To this declaration, copies of the two written promises, as they are called, were appended. Being exactly alike, I add a copy of one of them only.

"On the first day of September next, I promise to pay Anthony Phillips, or bearer, fifteen head of gentle, two year old, spayed sows and barrows, it being for value received of him, this 16th September, 1845.

DANIEL R. DODGE."

Upon the trial of this cause, at Common Law, the plaintiff tendered in evidence the originals of the copy notes appended to

his declaration, which were repelled by the presiding Judge, upon two grounds—

1. Because they were not described in the declaration.

2. Because there was in the declaration no allegation of the value of the specific articles in which the notes were payable.

The ruling of the Court, in repelling the notes, upon the grounds stated, is assigned for error.

The notes sued on here, are not promissory notes, and are not negotiable under the Statute of *Ann*, because not payable in money. 2 *Ld. Raymond*, 1396. 8 *Mod.* 362. *Stra.* 629, 1271. 7 *Johas. R.* 461. 3 *Kent*, 74, '5. *Story on P. Notes*, 20. 7 *Johas. R.* 321. 1 *N. & McC.* 254. *Pool vs. McCrary*, 1 *Kelly*, 321. *Broughton vs. Badgett*, *Id.* 77, '8. But notes payable in goods or stock, or indeed any thing, are made negotiable by our own Act of 1799. *Prince*, 426. *Broughton vs. Badgett*, 1 *Kelly*, 77, '8.

Whether, at Common Law, a note or promise to pay in specific property, is any thing more than an agreement to deliver the property, and to be declared on as such, need not be mooted in this case, because the legal character of such a paper is fixed, in this State, by Statute: They are made negotiable and of equal dignity with notes for the payment of money, by the Act of 1799; and by the Act of December, 1800, it is declared, that the price of the specific property, at the time the note falls due, having respect to the place where it is payable, with interest, shall be the criterion or rule of valuation. *Prince*, 813. By law, therefore, if such notes are not paid at maturity, the holder is entitled to recover, in money, the value of the property agreed to be paid at maturity, with interest. Such being the legal character of these papers, how ought they to be declared on?

[2.] Our Statute of 1799, requires the plaintiff plainly, fully and distinctly, to set forth his cause of action. At Common Law, under the Act of 1799, and by our own practice, which has grown up under that Statute, it does not admit of a doubt, but that the plaintiff would be required to aver the value of the property at the time when the notes fell due. So far as I know, that fundamental rule of pleading, that a party must, by clear and distinct allegations, bring himself within the law which regulates his right to recover, has, by no Judge and no Court, prior to the Act of 1847, been dispensed with in Georgia. Proof of the value of the property promised to be paid, is a legal condition

precedent to the plaintiff's right of recovery. According to all rule, he could not prove that without averring it. For the want of that averment, this declaration is radically, fatally defective. Failing to aver *that*, he has set forth, as springing out of these notes, just no cause of action whatever; and the notes were, for this reason, properly repelled. They were wholly irrelevant. It is not questionable—never has been questioned—but that in all material points, the allegations and the proof must correspond. This declaration avers a promise, in writing, to pay one hundred dollars, besides interest, on two written promises, bearing date at such a time, and due at such a time, and that the defendant refuses to pay; and this is all that it does allege. The notes offered in evidence are promises to pay, each, fifteen head of gentle, two year old, spayed sows and barrows. The disagreement between the *allegata* and proof is essential and palpable, and for this reason the Court was right in rejecting them.

But in answer to all these things, it is said, that by the Act of 1847, entitled an Act "to simplify and curtail pleadings at Law," the Legislature has, in *totidem verbis*, ordained the declaration in this case, as the form of pleading to be used in suing on just such notes as these. If this be true, the objections to the declaration before stated, we concede, pass for nothing. The right of the Legislature to declare what shall be the form of pleading, in any and every case, we do not question; and when the will of the Legislature is known, through the solemn forms of law, it is the duty of this Court to give effect to it, wholly irrespective of our opinions as to the wisdom and utility of the law. It is our unswerving purpose to discharge that duty, and in all cases to enforce the laws of the State, unless they are unconstitutional. If, in legislation, the General Assembly transcends its constitutional powers, it is our duty—a duty of paramount obligation—to give effect to the fundamental law, and to declare such legislation void. That, also, is a duty, from the discharge of which, it is our solemn purpose not to shrink. By the 3d section of the Act of 1847, it is declared, "That the form of an action, to recover money on a note, bill, bond, receipt or written promise of any description, by adding a copy of which, with the indorsers' names, (if any,) and credits, shall be appended; and when the suit is on a bond, the breach from which arises the right of action shall be set out plainly, may be as follows, to wit:" and then follows the

form of action adopted by the pleader in this instance. This law does not declare that the form prescribed shall be adopted—its language is permissive. Parties are left to adopt it or not, as they may think proper. They may adhere to the established rules of pleading. This is made conclusive by the 7th section of the Act, which provides, "That no departure from the before prescribed forms, shall work a non-suit, provided the plaintiff shall plainly and distinctly set forth his cause of action." By all of which, I understand that the plaintiff may adopt the prescribed form, and if he does, it shall be sufficient—or he may disregard that form, and, in that event, he shall not be non-suited, if he plainly and distinctly sets forth his cause of action. The Act of 1847 then, repeals no law of pleading in force prior to that time. It gives to parties simply a license to use the prescribed form, and if he elects to use it, he shall be protected in its use, and if he does not, he is subject to the Act of 1799, which requires the plaintiff plainly, fully, and distinctly, to set forth his cause of action. The proviso to the 7th section is simply in affirmation of the Act of 1799. Now, it is claimed, that in this case, the plaintiff has elected to sue according to the form prescribed, and following, literally, that form, he is not bound by any law, usage or practice previous to 1847.

The election, as a mere fact, is true; and that he has followed the form, with commendable exactitude, is true. But is it a case of election? Is any form of action prescribed by the Act of 1847, upon notes for specifics? We think not; and if we are right, the plaintiff can take nothing under the Act of 1847, and his pleadings are to stand or fall by the law of pleadings of force anterior to that Act. By that law, we have already passed upon them sentence of condemnation. Indeed, the learned counsel for the plaintiff does not defend them under that law. If these notes are embraced in the Act of 1847 at all, they fall under the 3d section, before referred to. The first relates to the recovery of real estate; the second, of personal property; the fourth, to actions on account; the fifth, to actions on judgments, and the sixth, to actions for breach of warranty in deeds, and these, and those embraced in the third section, are all the causes of action for which forms are provided.

Inasmuch as the Act of 1847 revolutionizes the entire system of pleadings, which, in the lapse of many years, had grown up

under the Act of 1799, and which was understood and approved by the profession, not universally, but very generally; and, inasmuch as that system was itself exceedingly liberal, abridging the prolixity, and rendering intelligible the obscurity, and simplifying the complexity of the special pleading system of the Common Law; and inasmuch as, I verily believe, that any legislative attempt to improve upon that system, by providing a *form* of action for all rights of action which grow out of the relations of men and property, would, from the sheer necessity of the case, prove a failure to a great extent—I am not inclined to extend, by implication or latitudinarian construction, the Act of 1847, to any case not clearly embraced in its terms. Aware of these things, the Legislature wisely declined to make the forms of the Act of 1847 obligatory, and made the use of them permissive, by which I do not mean to say, but that, when used, they are not obligatory on the Courts and the adverse party. It is quite a mistake to suppose that the pleadings are the unmeaning forms by which the business of the Courts is conducted. In them, rights consist—by them, wrongs are redressed—through them, justice and impartiality, upon the trial, are secured—by them, each party is informed of his adversary's claim—the time, place and manner of it—and, also, he is instructed, for the most part, as to the law upon which it is founded. The statements in a declaration or plea, subserve the purposes of pleading, unless they are co-extensive with the law which governs the case. No principle of law ought to be available for a party, unless his allegations of facts are so full as to authorize its application; and no material fact ought to be proven, unless notice of that fact is brought home, by sufficient averments, to the other side. He should be warned of the facts out of which the plaintiff's legal rights arise, that he may be prepared to contest them, and thus disprove or deny the legal right. Besides, the pleadings pass to record, and are the perpetual memorials of what has been settled. What does not appear, does not exist. How important, in this view of it, are full and explicit pleadings! The merit of pleadings does not consist in brevity—they may be curtailed until shorn of all their virtue. The simpler they are, the better; but simplicity, in this connection, does not mean brevity—it does exclude mere technicality—but it has reference to perspicuity and fullness. It is the very thing which the Legislature meant in the great Act of 1799, when it declared that the

plaintiff's cause of action, and the defendant's defence, should be *plainly, fully and distinctly* set forth. With these views, personal to myself, and, I believe, not irrelevant to the question, I repeat, that it is the judgment of this Court, that the plaintiff's case is not embraced in the 3d section of the Act of 1847, or any other section of that Act. That section, in its specification of grounds of action, for which it is providing a form, mentions notes, bills, bonds, receipts, and *written promises of any description*. The last class, *written promises*, it is said, includes these notes. Our construction is, that the promises intended are written promises to pay money. This construction is manifest in this, that the section declares, that the form of action to *recover money* on note, &c. and written promises, may be as follows, &c. It provides the form of an action to *recover money*. True, says the plaintiff, and this is an action to *recover money*. The reply is, that the Act declares, not only that the form prescribed is for an action to *recover money*, but, farther, to *recover money due on note, bond, &c.* The question, then, first, is this: are these notes promises in writing, to pay money. Clearly they are not. They are promises to pay *two year old, gentle, spayed sows and barrows*. Upon this promise upon its face, the obligation of the maker was to pay in the property specified—it was his privilege to pay the notes, at maturity, in that property. Such was his undertaking, and it cannot be pretended, but that if he had delivered the property at the maturity of the notes, to the holder, or legally tendered it, they would have been discharged. They are not promises to pay money. Nor, second, is money *due* upon them. Up to and at the time of maturity, there is no money due upon them. All that is due, is the property named. But the maker having failed to pay, in that property, at the maturity of the notes, how stands the matter? Upon such failure, the law, as we have seen, steps in and declares him liable to pay—what? Any ascertained sum of money? No: but the value of the property, at the maturity of the notes, which value is to be ascertained by proof, and the verdict of a Jury. What, then, is the plaintiff's cause of action? The notes are inducement to it, and the plaintiff's cause of action is an *assumpsit*, which the law raises, that after breach of his obligation to pay in property, the maker shall pay so much money as the property was worth when the notes fell due. Such cause of action is not among the enumerated in the 3d section of the

Act of 1847. These notes being made negotiable, by Statute, I have no doubt but that the legal assumpsit follows them into the hands of a transferee—just as the obligation of a promise to pay a note, barred by the Statute, accompanies it into the hands of a transferee. We think that the Legislature referred to simple, direct promises to pay money. A bond with conditions, upon breach of which a right of action arises, although a conditional promise to pay money, is not included in the *written promises* of this section—nor are breaches of a warranty in a deed; because special provision, different from that relied on by the plaintiff, is made for these. From this fact we satisfactorily infer, that none of that class of cases—causes of action where breaches of conditions, or failure to perform agreements, give rise to the plaintiff's right of action—are included. This belonging to that class, this, therefore, is not included. For these reasons we find no error in the first assignment.

[3.] Upon the rejection of the notes, the plaintiff moved to amend his pleadings, so as to admit them. The presiding Judge refused the motion, and that is assigned for error. Viewing this declaration as we have represented it, an amendment adequate to let in these notes would be, at no time, allowable, because such an amendment could not fall short of the substitution of an entire new cause of action. Excluding, as we have done, this cause from the operation of the Act of 1847, it comes under the law which regulates pleadings, aside from that Act. By that, as an action founded on these notes, the declaration is wholly defective. By that law, the appending of copies of the notes does not aid it. Those copies are no part of the declaration, and, if they were, there is still no averments to make out a cause of action upon them. This cause was before the Jury at Common Law. By the 54th Rule of Court, neither the declaration nor the answer is amendable, at Common Law, in matters of substance, after the case has gone to the Jury. This cause had gone to the Jury—it was at Common Law—and the amendment was in matter of substance. *Hotchkiss*, 950.

By the Act of 1818, if there is a good, legal cause of action, plainly and distinctly set forth, every other objection is, on motion, amendable, without delay or additional cost. But here, there is not, as I have endeavored to show, a good, legal cause of action, plainly and distinctly set forth. By the same Act, no suit

shall be non-suited for any *formal* variance between the allegation and proof, when the cause of action is substantially set forth. But here the cause of action is not substantially set forth, and the variance is not formal, but essential. *Prince, 442, '3.*

Let the judgment of the Court below be affirmed.



C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT TALBOTTON,
JANUARY TERM, 1850:

No. 9.—WILLIAM A. MAXWELL, plaintiff in error, vs. CHARLES
T. HARRISON, defendant.

- [1.] The true criterion for determining whether an amendment is admissible, is this: whether the amendment is of another cause of controversy, or whether it is the same contract, or injury, and a mere permission to lay it in a manner which the plaintiff considers will best correspond with the nature of his complaint, and with the proof and the merits of his case.
- [2.] The plaintiff cannot introduce an entirely new cause of action; but if he adhere to the original cause of action, he may add a count substantially different from the declaration.
- [3.] In action of trover against one, charging him, *as trustee, &c.* the plaintiff may amend, by striking out the words, *as trustee, &c.*
- [4.] The declarations of a party, while in possession of property, as to the ownership, when it was against his interest to make them, may be given in evidence against one who subsequently acquires a title from the declarant.
- [5.] The admissions of a party, made under oath as a witness, or in a voluntary affidavit, may be given in evidence against him, in a suit in which he is a party.
- [6.] Possession of property, with a claim of title adverse to that of the true owner, is sufficient evidence of conversion.
- [7.] It is error in the Court to charge the Jury, that a remainder in slaves, to take effect and be enjoyed after a life estate, may be created by parol.

Trover, &c. in Lee Superior Court. Tried before Judge WARREN, May Term, 1849.

Charles T. Harrison brought an action of trover, &c. in Lee Superior Court, for a negro girl, Caroline, against William A. Maxwell, "as trustee for Catharine Bozeman." When the cause was called for trial, at May Term, 1849, plaintiff's counsel moved to strike out the words "as trustee for Catharine Bozeman," wherever they occurred in the petition, so that the cause might proceed against the defendant, individually. No notice had been given to defendant of the motion to amend. The Court sustained the motion, and defendant, by his counsel, excepted.

Both parties having announced themselves ready, the cause was submitted to a Jury.

Both parties claimed title under Mrs. Sarah Cain. Harrison under an alleged parol gift in 1843, and the defendant under a voluntary deed to him, in trust for Catharine Bozeman, made in 1846. Charles T. Harrison was the son of Mrs. Cain, by a former marriage, and Catharine Bozeman was her daughter by her last husband, John Cain. In the year 1843, Mrs. Sarah Cain went to live with Harrison, and carried the negro girl, Caroline, with her. They both remained there during the years 1843 and 1844. After that time, Mrs. Cain lived a portion of her time with each of her children, and generally carried the negro with her. Mrs. Cain died at Bozeman's, in 1846.

Plaintiff (Harrison,) proposed to prove, by several witnesses, the sayings of Mrs. Sarah Cain, during the time she lived with Harrison, by which she acknowledged that the negro girl, Caroline, "belonged" to him, and that she "had given her to him;" and also her sayings to the same effect after 1844, and while the negro was waiting upon her. To all which evidence the counsel for defendant objected, on the ground that these sayings of Mrs. Cain should not go to the Jury against the defendant—the title being out of Mrs. Cain, as the declarations themselves show, and consequently they were not against the interest of the declarant, and more particularly while she lived at Harrison's, as the negro was then proven to be in the possession of Harrison. The Court overruled the objection, and the defendant excepted.

Plaintiff proposed to prove by Sarah Hobbs, examined by interrogatory, that "she never heard of any person claiming said

girl, during the time that he (Harrison) was in possession of her, and exercised the ownership." Defendant objected that this was a conclusion from facts, and could not be proven by the witness. The Court overruled the objection, and defendant excepted.

Plaintiff below (Harrison,) proposed to prove by David Spence, "that he was present at the trial of a possessory warrant against Bozeman, the husband of Mrs. B., for this negro, before the commencement of the suit—heard defendant admit, in his testimony as a witness, on that occasion, that he had the right of possession to the negro, and the right to control her, as the trustee of Mrs. Bozeman, and heard him declare, in reply to a question from the presiding Justice, that he would not give up the negro, if the Court gave the possession to plaintiff, because Bozeman had no right to the negro—that these admissions were made for the purposes of that trial." To the admission of this testimony defendant objected, on the ground that the proper proof of such a trial, and the parties to it, was the possessory warrant itself, or the evidence of the presiding Justice, and defendant had a right to restrict his admissions to that trial; which objection was overruled by the Court, and defendant excepted.

Plaintiff below proposed to prove by Hiram Watts, he not being a physician, his opinion as to the soundness of Mrs. Sarah Cain's mind; defendant objected, and the Court overruling the objection, defendant excepted. The witness swore "that, in his opinion, from what he saw of her and heard her say, that she was not, at all times, in her sound mind—being some 75 or 80 years old. In a conversation he had with her on one occasion, at the house of plaintiff, Mrs. Cain would repeat the same thing over and over again, and would vary her statements of the same circumstances—complained of the treatment she had received from her children." "Mrs. Cain told the witness, on one occasion, that Caroline was to be Harrison's at her death, or she would give him the negro when she died—does not recollect which."

The plaintiff below having closed his case, defendant moved the Court for a non-suit—

1st. Because plaintiff had shown no property in himself.

2d. Because he had shown no conversion by Maxwell, the defendant, or that the negro had ever been in his possession, or under his dominion.

The Court overruled the motion, and defendant excepted.

The defendant introduced the trust deed made to him by Mrs. Cain, and proved, by the subscribing witnesses, that she was in her right mind at the time of its execution. It was in evidence, that the negro was with Mrs. Cain at the time of her death, and remained at Bozeman's after that time—Maxwell claiming the right to control her, as trustee.

The Court charged the Jury, that "the declarations of Mrs. Cain, while in possession of the property, that the title was in Harrison—she having given it to him—were proper evidence for their consideration; and if it convinced them of the title of the plaintiff, they should so find. The conversion may be proved by proof of demand and refusal; though this is not, of itself, conversion, but evidence of conversion. Conversion may be proved or inferred, by proof of acts of defendant, evidencing ownership while title is in plaintiff. When defendant claims title to possession and control of the property, against the right of plaintiff, these acts of ownership are usually proven by possession and use of the property; but may be proved by the declarations of the defendant himself."

"The Statute of 19th December, 1838, declaring parol gifts of slaves not to be good, and available at Law and in Equity, against purchasers from the donor, without notice, in the opinion of the Court, does not apply to such purchasers as defendant appears to be here, and applies only to purchasers for a valuable consideration, and not to volunteers or donees, as in this case."

The Court farther charged the Jury as follows: "I am requested to charge you, that possession must have accompanied the gift. This is the law. The word gift includes change of possession, and the possession and dominion accompany the gift presently, unless the terms of the gift limit the time when the possession in the donee is to commence: then it is not necessary. A may give personal property, by parol, to B—passing the title presently, and limiting the possession to C for life; and the gift to B is good. And so A may give property, by parol, to B—the title to pass immediately, but limit the possession of B till after the donor's death—the donor retaining possession, and using the property himself, till that time. And if such was the fact in the present case, the gift to Harrison was good, notwithstanding the subsequent conveyance to defendant, in trust, for Mrs. Bozeman—it not being competent for Mrs. Cain to revoke the gift."

To which several charges, the defendant excepted.
And upon these several exceptions, error has been assigned.

Lean, for plaintiff in error.

E. R. BROWN, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was the amendment moved for by the plaintiff allowable? We think it was. The true criterion for determining whether an amendment is admissible, we take to be this—whether the amendment proposed is another cause of controversy, or whether it is the same contract or injury, and a mere permission to lay it in a manner which the plaintiff considers will best correspond with the nature of his complaint, and with his proof, and the merits of his case?

[2.] For, while the plaintiff cannot introduce an entirely new cause of action, he may, nevertheless, add a new count, substantially different from the declaration, provided he adheres to the original cause of action. Accordingly, it has been held that, in an action for a legacy against one charged as *executor*, the plaintiff may amend, by charging him as *devisee*. *Leighton vs. Leighton*, 1 Mass. R. 433.

[3.] Here, it is proposed to strike out the words "as trustee, &c." wherever they are added to the name of the defendant, so as to let the suit stand against him individually; and we can see no objection to it. Trover will not lie against a *trustee*, as such; for no one can commit a *tort* in his representative or fiduciary character. He may defend, however, under his title as trustee, whether sued in that capacity or not. Had the defendant made it appear that he was surprised on account of the amendment, the Court would have continued the case, at the instance of the amending party.

[4.] Were the declarations of Mrs. Cain, the former owner, and from whom both plaintiff and defendant derive title, good, as to whom Caroline belonged, made before she conveyed the girl to Maxwell, for the use of Mrs. Bozeman? The testimony is contradictory as to the possession of the negro, when these declarations were made. Some of the witnesses testify that she was

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in the possession of Harrison, the plaintiff; others, that she remained with Mrs. Cain all the while, and until her death. All agree, however, that the declarations were made before the deed of gift was executed to Maxwell; and inasmuch as he took a conveyance from Mrs. Cain, *subsequent* to these admissions, he, it would seem, would be estopped from denying property in the declarant. If, then, they were made when it was against her interest, and before the adverse title accrued, they would be competent evidence. *Wright*, 441. 4 *Ala.* 40. 4 *Dev. & Batt.* 117. 4 *Miss.* 8. 5 *Miss.* 28. 2 *Spear*, 75. 1 *Dev.* 3. *Jones vs. Dabbs*, *Geo. Dec.* part 1, 44. In this last case, the Court held, that where property levied on by execution, is claimed by a third person, the declaration of the defendant in execution, prior to his being defendant, may be given in evidence, to sustain the claimant's title—such declarations being presumptively against his interest. It will be perceived, that this is not in conflict with the decision of this Court, as to the sayings of the defendant, after the relation of plaintiff and defendant has been created.

It is certainly true, that the ownership of property is a conclusion of law, from the evidence. But the testimony objected to was, that the witness never heard any other person than Harrison claim the *Negro Caroline*, while he had her in possession, and exercised the ownership. The object of the proof was, the negation of any adverse claim, at or during a particular period, viz. while the plaintiff had her in possession, using her as his own.

[5.] Harrison having sued out a possessory warrant, under the statute, against Bozeman, Maxwell was called on to testify on the trial. He stated that he, and not Bozeman, had the right to control *Caroline*; and that he would not give her up to Harrison, although the decision might be in his favor. This testimony was objected to, upon the ground, that the warrant should be produced, and the evidence of the presiding Magistrate; and for the additional reason, that these admissions of Maxwell were made for the purposes of that proceeding alone, and that it was not competent to use them for any other purpose. We apprehend that, in order to prove what a witness swore to on a particular trial, it is not necessary to produce the record of the case. The evidence sought to be adduced, is *de hors* the record; and moreover, that it is not competent for a witness to limit or restrict his testimony to the particular trial, for which it is offered. He is

bound, by the obligations of his oath, to tell *the truth*. And that his evidence, thus elicited, in a judicial proceeding, or even in a *voluntary affidavit*, may be used as evidence against him, as an admission of the facts contained therein, is well settled, by all the authorities. 1 *Ala. Rep.* 585. 4 *Dev. & Batt.* 124. 10 *Shep.* 69. And even the admissions of trustees, holding the legal title to property, and who are never *presumed* to make admissions adverse to the interests of those for whom they act, are competent evidence. 3 *Hemph.* 472.

We see no objection to the testimony of Watts, as to the sanity of Mrs. Cain; his opinion being accompanied, as it is, with the reasons upon which it is founded. It comes fully within the rule laid down by this Court, in *Potts vs. House*, 6 *Geo. Rep.* 324.

[6.] Two grounds were occupied in the motion for a non-suit. 1st. That the plaintiff had shown no property in himself. 2dly. That he had proven no conversion by Maxwell.

Several of the witnesses testified to the acknowledgments of Mrs. Cain—that she had given the girl to Harrison—that she belonged to him—and that the donor had parted with the possession and dominion of the slave. This was certainly enough to carry the case to the Jury. As to what constitutes a conversion, this Court has repeatedly held, that possession, with a *claim* of title adverse to that of the true owner, is sufficient; and this is undoubtedly the doctrine of the books. 2 *Dev.* 130. 1 *McCord*, 504. 1 *N. & M.* 592. 1 *Bailey*, 546. 7 *Johns.* 254. 10 *Ib.* 172. 5 *Coven.* 323. The declarations, therefore, of Maxwell, on the trial of the possessory warrant, that *he* had the right to control the slave, and that he would not give her up, even if possession was awarded by the Court to Harrison, amounts to a conversion in law. And as it respects the possession, it was clearly in Maxwell, as trustee. The possession of Mrs. Bozeman, the *cestui que trust*, was permissive only, and was, in fact, his possession.

[7.] The Court, in its charge to the Jury, toward the conclusion, assumes the law to be, that a remainder in slaves, to take effect and be enjoyed after a life estate, may be created by parol; whereas, the very contrary was ruled by this Court, in *Kirkpatrick vs. Davidson*, 2 *Kelly*, 297. And as there was evidence to support this charge, and the misdirection may have controlled the verdict of the Jury, we are compelled, reluctantly, to remand this cause for a new trial—upon this ground alone—affirming

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the judgment upon all the other points made in the bill of exceptions.

Judgment reversed.

No. 10.—GEORGE W. HARRISON, plaintiff in error, vs. JOSEPH ADCOCK and others, defendants.

[1.] The Statute of 32 Henry VIII. is of force in this State, and a deed made by an infant, while under age, will not be avoided by the execution of a deed after he arrives at twenty-one years of age, when the possession of the land is held *adversely* to him, but the latter deed will be void under the Statute.

[2.] If a party is to be constituted a trustee, by the decree of a Court of Equity, on the ground of *fraud*, his possession is *adverse* from the time the circumstances of the fraud were discovered.

In Equity, in Randolph Superior Court. Decided by Judge WARREN, October Term, 1849.

The questions in this cause arose upon a motion to dismiss a bill, filed by George W. Harrison against Joseph Adcock, James Suggs and Floyd Conyers.

The bill charged, that Mary Ann Odem, an illegitimate, drew a lot of land in Randolph County; that on 17th February, 1839, Mary Ann Odem intermarried with Delaware Dean, who thereby became the owner of this lot of land; that on the 21st February, 1839, Joseph Adcock, who had intermarried with the mother of Mary Ann Odem, by various fraudulent representations, menaces and threats, induced Dean, who was of very weak mind, and an infant in law, to make to Adcock a deed to one-fourth of the land; Adcock, among other things, agreeing, that "If Dean would convey the land to him, Adcock, he would hold the title for the same in trust, and secure it for the use of the said Dean, his wife and their heirs;" and by the same means, Adcock, on 23d day of February, obtained a deed to the remaining three-fourths of the

land; that Adcock sold the land to Suggs, and Suggs to Conyers,—each having knowledge of the fraud. Adcock took possession shortly after the purchase, and had remained in possession, or those claiming under him, ever since the year 1839.

The bill farther charged, that on 1st March, 1839, Dean, for a full and valuable consideration, contracted to sell this lot of land to Harrison, the complainant, and gave his bond for titles thereto, when the purchase money was paid; that in February, 1846, the purchase money having been paid, Dean, after arriving at twenty-one years of age, made a deed to Harrison, to the lot in dispute. The prayer was for the cancellation of the deeds to Adcock, Suggs and Conyers, and that the defendants be decreed to deliver the possession of the land to complainant, and that Conyers do execute a title to the land, and an account of the rents, issues and profits.

The Court below dismissed the bill for want of Equity, and complainant appealed to this Court. The only points here argued and decided were—

1st. Whether the Statute, 32 *Henry VIII.* against maintenance and the sale of pretended titles, was in force in Georgia.

2d. Whether the facts stated in the bill, constitute a case of adverse possession in Adcock and those claiming under him, against Dean, at the time the deed to Harrison was made by Dean, in February, 1846.

H. L. BENNING, for plaintiff in error.

W. TAYLOR, for defendant.

By the Court.—WARNER, J. delivering the opinion.

The complainant alleges in his bill, that the title to the lot of land in controversy, was fraudulently procured by Adcock, from Dean, while the latter was an infant, and that Suggs and Conyers, who derived their title from Adcock, had notice of these facts.

It is farther alleged, that the defendants had been in possession of the land, so conveyed by Dean, ever since 1839, and that in February, 1846, the complainant obtained a deed from the infant,

Dean, to the land, who was, at the time of making the latter deed, twenty-one years of age.

The prayer of the bill is, that the defendants may be decreed to deliver the possession of the land to the complainant, account for the rents and profits, and that Conyers do execute to the complainant a title to the land.

The Court below sustained a general demurrer to the complainant's bill, for want of Equity, on the ground, that the title of the complainant, derived from Dean, in 1846, was void, inasmuch as it appeared, on the face of the complainant's bill, that at the time it was executed, the possession of the land was held *adversely* by the defendants, or some of them.

[1.] For the purpose of reversing the judgment of the Court below, it is now contended, that the Statute of 32 *Henry VIII.* is not of force in this State, and if that Statute be of force here, the possession of the defendants was not *adverse* to Dean's claim of title, and possession under it.

In *Harris vs. Cameron*, (6 *Ga. Rep.* 382,) this Court held, that the Statute of 32 *Henry VIII.* was of force in this State, and that a deed executed by an infant, after coming of age, was void under that Statute, there being *adverse* possession of the land at the time the deed was executed.

Here the complainant derives his title from Dean, after he arrived at twenty-one years of age, while the possession of the land was held by the defendants.

Was the possession of the defendants *adverse* to that of Dean, at the time the deed was made to the complainant? We think it was, and that the Statute of Limitations would run in their favor to protect such *adverse* possession.

The defendants had possession of the land under color of paper title—the deed of the infant was not *void*, but *voidable* only.

[2.] But it is said, that Adcock, by his *fraudulent* representations to Dean, in order to procure the title from him, must be considered, in a Court of Equity, as a *trustee* for Dean; and that the other defendants, having notice of the fraud of Adcock, occupy the same relation to him; and, for that reason, the possession of the defendants was not *adverse* to Dean, at the time the deed was made to the complainant. If a party is to be constituted a *trustee*, by a decree of a Court of Equity, founded on *fraud*, his possession is *adverse* from the time the circumstances of the *fraud*

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were discovered, and the Statute of Limitations will, therefore, run from that time. - *Angell on Limitations*, 509. The defendants here, are sought to be made *trustees* by the decree of the Court, on the ground of *fraud*. There is no allegation that the fraud has recently been discovered, but so far as the allegations in the record go, it would appear that Dean was as cognizant of all the facts when the first deed was made to Adcock, as he was when he made the deed to the complainant.

The possession, then, of the defendants must be considered as *adverse* to that of Dean, so far as to allow the Statute of Limitations to run, upon a proper case being made, and is also to be considered as *adverse*, so as to avoid the deed made by Dean in February, 1846.

Let the judgment of the Court below be affirmed.

No. 11.—M. H. BALDWIN and another, plaintiffs in error, vs. DAVID M. LESSNER, defendant.

[1.] If the declaration allege a special contract for the rent of mills, to be paid in repairs, and it is proven, on the trial, the plaintiff cannot recover on the common count for a *quantum meruit*; he will be held to the special contract, and the measure of damages is the value of the repairs agreed to be made, and the loss he may have sustained by reason of the failure to make them.

Assumpsit, &c. in Randolph Superior Court. Tried before Judge WARREN, October Term, 1849.

Lessner brought suit against Baldwin and Mills, upon a special contract, by which, in consideration for the use of certain mills belonging to Lessner, the defendants agreed to make certain repairs, specified in the contract. The declaration averred, that the repairs were not made, and were reasonably worth \$250. There were, also, common counts for the rent of the mills, for the time defendants used them.

On the trial, the plaintiff proved the special contract, and its breach; and the Court farther allowed evidence, under the common counts, to show the reasonable rent of the property.

The Court charged, "That the Jury would be authorized to find on the counts in the declaration, other than that on the special contract, and the measure of damages would be, properly, the value of the use of the mills for the term of the lease."

This decision was excepted to, and error alleged therein.

There were several other errors assigned, but this alone was reviewed by the Supreme Court.

BOWER, (represented by H. HOLT,) for plaintiff in error.

W. TAYLOR, for defendant, cited—

Douglass, 23. 1 *T. R.* 81. 2 *East*, 145. *Rye vs. Stubbs*, 1 *Hill's R.* 384.

By the Court.—NISBET, J. delivering the opinion.

[1.] The declaration contains three counts; one, for so much money, due for rent of the mills, at a given rate per month, with a bill of particulars; one, a *quantum meruit* count, claiming as much for the rent of the mills as the plaintiff deserved to have, for the time that the defendants used them; and the third, setting forth a special agreement, by which, in consideration of the use of the mills for five months and a half—from some time in April, to October, 1848, the defendants agreed to do, within that time, certain repairs (which are specified) to the mill, yard and bridge—averring that defendants went into, and held possession, during the term, and failed to make the repairs as stipulated. Upon the trial, the plaintiff proved the special contract substantially, as laid in the declaration. There was, also, evidence of the value of the mills for the term—some evidence of an extension of the time in which the defendants were to make the repairs—and of a subsequent refusal of the plaintiff to permit the defendants to make them, after the original term had expired, and within the term as extended. It was in evidence, that the repairs were not made within the original term, and were not made at any time. In this state of the case, before the Jury, the Court charged them,

“that they would be authorized to find on the counts in the declaration, other than that on the express contract, if they believed that the defendants had not done the repairs according to the express contract, and that the measure of damages would properly be the value of the use of the mills for the term.” Upon the ground that, in this charge, the Court erred as to the law of the case, and also upon other grounds taken in the rule, the defendants moved for a new trial, which was refused; and thereupon they excepted. Did the Court correctly administer the law in this case? We think not. In the actual position of it, we think that the plaintiff could not recover upon the common counts, but was held to recover on the special contract, as proven. Having declared on a special contract, and proven it, that contract was the evidence of his rights, and of the liability of the defendants. This is the case of a contract executed by the plaintiff, by his admission of the defendants into possession of the mills, and their enjoyment of that possession and its profits, for the term stipulated, and executory as to the defendants, who agreed, in consideration of the use and occupancy of the mills, within the stipulated term, to make certain specific repairs. These repairs they did not make according to the contract. It was not abandoned by either party—it was not in part executed by the defendants. It was a subsisting contract all the original term—a contract which they had wholly failed to execute. For this failure, the plaintiff had the right to go upon them for damages; and the measure of damages is the value of the repairs agreed to be made, and such farther injury as the plaintiff may have sustained, by reason of their breach of the contract. *Indeditus assumpsit* will not lie, when there is a subsisting unexecuted agreement. Where there is an express agreement laid and proven, the plaintiff cannot resort to an implied one. This rule covers this case, and it is not necessary to advert to the exceptions under it. This case does not fall within any of them. 1 *Chitty Plead.* 1, p. 246, 7, notes. 2 *T. R.* 105. 3 *East*, 78, 80, 85. 6 *T. R.* 325. 7 *Id.* 243. 1 *Stra.* 648. 3 *Bos. & Pull.* 247. 8 *Johns. R.* 439. 10 *Id.* 37. 12 *Id.* 274. 18 *Id.* 451. 8 *Mess.* 118. 7 *Id.* 430. 2 *Shep.* 383. *Wright*, 577. 2 *Harring.* 484. 2 *McLean*, 216. 12 *Com.* 558. 4 *Smedes & Marsh*, 652.

“If, in this case, the term was extended, yet still the contract remained the same. If the performance, within the extended term,

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was prevented by the act of the plaintiff, however it may be available for the defendants, it would certainly give no right to him to recover upon his common counts. To say the least of it, he was in no better situation, by reason of his preventing the defendants from performing their part of the contract.

With these views of this case, it must go back; and the points as to excessive damages and newly-discovered evidence, need not, therefore, be considered.

Let the judgment below be reversed.

No. 12.—ISAAC E. BOWER, plaintiff in error, vs. JAMES B. SMITH, defendant.

[1.] To authorize a recovery upon shop books, where the entries are made in the hand-writing of the party, the plaintiff, among other things, must prove by his customers, that he kept correct books. And it is no compliance with the rule, for the witnesses to state, that they considered their accounts reasonable—admitting, at the same time, that they had never examined the items, and could not say that the services charged were actually rendered.

[2.] Before the books of the party can be admitted in evidence, they are to be submitted to the inspection of the Court; and if they do not appear to be a register of the daily business of the party, and to have been honestly and fairly kept, they are to be excluded. Explanatory evidence may be offered; and if the objections are *prima facie* accounted for, the books should be submitted to the Jury—letting the objections go, under the charge of the Court, to their *credit*, rather than to their *competency*.

[3.] Books, *per se*, are not sufficient to charge the defendant with the debts and accounts of third persons.

Assumpsit, &c. in Randolph Superior Court. Tried before Judge WARREN, October Term, 1849.

This was an action on an account of a physician, James B. Smith, against Isaac E. Bower, to which were filed pleas of the

general issue, and that the plaintiff was not a licensed physician, as required by the Statute.

On the trial, plaintiff offered in evidence his books—proved, by his own oath, that these were his books of original entries; by two witnesses, that the charges in the account were the usual charges made by physicians; by one witness, that he had compared the items in the account with the books, and found that they corresponded, except one item, to-wit: an account of one Austin, charged to defendant; also, by two witnesses, that plaintiff had attended their families, and they considered his bills rendered reasonable, but they had not examined the items, and could not say that he had performed the service charged therein. On inspection of the books, it appeared that one item, against the defendant, was entered by interlineation, in a different ink and appearance from the remaining items, charged at the same date; and it further appeared, that, on several of the days wherein defendant was charged with attention "per day," the books contained items of charge against other persons the same day, for mileage—often for twelve miles—and, in some instances, such charges against two or three different persons the same day.

Defendant objected to the books, on the ground that the preliminary proof was not sufficient to authorize their introduction, with these suspicious circumstances unexplained. The Court admitted the books, and defendant excepted.

Proof was offered by the defendant, to show that the plaintiff made extravagant and incorrect charges, and also the certificate of the Secretary of the Board of Physicians of Georgia, that Dr. Smith was not licensed to practise, as required by the Act of 1839. There was no evidence to show that Dr. Smith was within the proviso to that Act, in favor of physicians practising before its passage.

The bill of exceptions stated, that "the Jury dispersed for the night," before being charged by the Court, but did not state whether it was with or without the consent of the parties.

The Court charged, "that it was not necessary that plaintiff should have a license from the Board of Physicians, provided he was practising as a physician between the years 1834 and 1839;" to which charge, defendant excepted.

The Court farther charged, "that, to authorize a recovery, plaintiff must have proven that he kept no clerk—that the books

were his books of original entries—that he kept correct books, by *aliunde* evidence—that there had been dealings between the parties—that the entries in the books corresponded with the items in the account sued on—and that the books must be supported by the supplemental oath of the party.”

The Jury returned a verdict for the full amount of the account; whereupon, defendant moved for a new trial—among other grounds—

1st. Because the verdict was contrary to the charge of the Court, as to the books of plaintiff.

2d. Because the Court erred in admitting the books.

3d. Because there were items in the account for one Arthur and one Austin, and no proof made that the defendant had assumed to pay for their accounts.

4th. Because the Court erred in its charge, as to the license of the plaintiff.

5th. Because the Jury dispersed.

The Court overruled the motion; and defendant excepted.

H. Holtz, for plaintiff in error.

W. TAYLOR, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

As all the questions made during the progress of the trial, came under review on the motion for a new trial, we shall direct our attention exclusively to that.

[1.] It is complained that the verdict of the Jury was contrary to the charge of the Court. If this be so, and the law of the case was properly submitted, a new trial should have been awarded. What was the charge? That, in order to authorize a verdict for the plaintiff, upon his medical account, he must prove that he was in the habit of keeping correct books, by persons who had dealings with him. We believe the rule of law to be correctly stated; and upon examining the record, we are satisfied that the proof did not come up to it. Brooks and Beall, the only witnesses offered for that purpose, testified that Dr. Smith attended their families, and they considered the bills rendered by him reasonable; that they both state, they had not examined

their accounts, and could not say that he had performed the several items of service for which he had charged them. This evidence is no compliance with the rule. The accounts rendered against the witnesses may have been reasonable in the aggregate; but that is not the point. Were they just? Were they correct in their items? This is the *aliunde* testimony which gives faith and credit to books.

[2.] It is insisted that a new trial should have been granted, because the Court erred in permitting the books to be offered in evidence—it appearing, from their inspection, that an interlineation had been made in them, in different ink from the items charged at the same date; and further, that the books contained evidence upon their face, that several items charged against the defendant were unjust; namely, the item of *attendance per day*—the books showing that on the same days, the plaintiff charged mileage to other persons, residing at a distance, in some instances, of twelve miles from the defendant.

All the Courts concur, that before the books of the party can be admitted in evidence, that they are to be submitted to the inspection of the Court; and, if they do not appear to be a register of the daily business of the party, and to have been honestly and fairly kept, they are to be excluded.

Now, the difficulty is, in determining what fraudulent appearances, upon the face of the books, will authorize a Court to withhold them from the Jury. When it is recollected that a large portion of our blacksmiths, mechanics, and laboring men, who keep books, have never been taught this art, and many of them are entirely uneducated, it would not do to prescribe a rule, so stringent as to operate, in many cases, to the exclusion of the only evidence upon which they could secure the value of their labor. And it would seem to me, that the irregularities in the books should be exceedingly gross and palpable, to justify the Court in arresting the evidence, from that tribunal whose peculiar province it is, to judge of the credibility of testimony.

I concede that the books might, upon their face, appear to have been so unfairly and dishonestly kept, as to authorize the Court to lay its hands upon them, and refuse their admission, at least until evidence was offered, explanatory of these discrediting circumstances. Suppose, for instance, the account on the books was entered, settled or satisfied in full. Surely, the books, *per se*,

would be no evidence of indebtedness, but of the contrary; and yet, the plaintiff might be abundantly prepared to prove that this entry was made thereby mistake. Should he not be permitted to do so, and thus restore the books to *competency*; and so transfer the issue from one of *law*, to the *Court*, to one of *fact*; for the Jury? This, it occurs to me, would be the better practise, especially as it would be both the privilege and the duty of the Court, to call the attention of the Jury to these false and fraudulent appearances, in its summing up in conclusion. We are inclined to hold, therefore, that the Court did not err in suffering these books to go to the Jury.

[3.] We are clear that the verdict was not authorized by the evidence, so far as it charged the defendant with the accounts of Austin and Arthur. The books were insufficient, of themselves, to make him liable for the debts of third persons; and there was no other proof tendered.

[4.] We are equally clear, in holding that it was error in the Court, to charge the Jury that it was not necessary for the plaintiff to show a license, provided he was a practising physician between the years 1834 and 1839—there being no evidence, so far as the record shows, to support such a charge.

Upon these grounds, therefore, a new trial is awarded.

We find it unnecessary to express any opinion as to the alleged misconduct of the Jury, in dispersing before they rendered their verdict. The record does not show but that the Jury separated by the consent of the plaintiff in error, which, if given, as we are bound to presume it was, would have cured the irregularity, even if it be such a one as would otherwise have vitiated the verdict.

Judgment reversed.

No. 13.—JEREMIAH RIORDON, guardian, &c. plaintiff in error, vs. W. HOLIDAY and wife and others, defendants.

[1.] Where a testator, by his will, made the following bequest, "I lend the following negroes, (naming them) with all their increase, to Frances Holiday, Elizabeth Russell and Jarva Lane, children of my first wife; this loan to continue during their natural lives, and at their death, the property to be equally divided among the children of Frances Holiday and Jarva Lane; and in the event of Elizabeth Russell having child or children, they also to have one third part; but if the above named Elizabeth Russell die childless, the whole of the property then, shall go to the children of Frances Holiday and Jarva Lane. It is my desire that John, a negro boy, one of the negroes mentioned in this article, should go into the possession of Jarva Lane, and be considered so much of her part. It is my desire, also, that no part of the above mentioned property, shall come into the hands or possession of James Russell, the husband of Elizabeth Russell, but it shall be held by Frances Holiday and Jarva Lane, and go to their children, if James Russell should survive his wife, Elizabeth Russell." *Held*, on a bill filed by one of the children of Jarva Lane, for a distribution of said property, in the lifetime of Frances Holiday, that it was the intention of the testator, that his three daughters should hold the possession of the life estate in the property, during their joint lives, or during the life of the survivor, and that the grand children of the testator were not entitled to a distribution of the property, until the death of the testator's last surviving daughter.

In Equity, in Dooly Superior Court. Decided by Judge WARREN, November Term, 1849.

The questions in this cause arose upon the construction of the following item in the will of John Smith, deceased :

"I lend the following property, (negroes) to Frances Holiday, Elizabeth Russell and Jarva Lane, children of my first wife; this loan to continue during their natural lives, and at their death, the property to be equally divided among the children of Frances Holiday and Jarva Lane; and in the event of Elizabeth Russell having child or children, they also to have one third part; but if the above named Elizabeth Russell die childless, the whole of the property, then, shall go to the children of Frances Holiday and Jarva Lane. It is my desire, that John, a negro boy, one of the negroes mentioned in this article, should go into the possession of Jarva Lane, and be considered so much of her part. It is my desire, also, that no part of the above mentioned property

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shall come into the hands or possession of James Russell, the husband of Elizabeth Russell, but it shall be held by Frances Holiday and Jarva Lane, and go to their children, if James Russell should survive his wife, Elizabeth Russell."

Elizabeth Russell died childless. Jarva Lane had five children by Lane, and after Lane's death, intermarried with one Smith, and after his death, intermarried with Jeremiah Riordon, by whom she had one child. Subsequently she died. Frances Holiday is still alive.

This bill was filed by Jeremiah Riordon, as the guardian of his child, against Frances Holiday, her husband and children, and the children of Jarva Lane, by her first husband, alleging the foregoing facts; and farther, that defendants had the whole of this property in possession, and refused to permit his ward to participate therein. The prayer of the bill was for a division of the property, and an account of the hire and profits.

To this bill was filed a general demurrer, for want of equity.

The Court below sustained the demurrer, and dismissed the bill, "On the ground that the time appointed for the distribution or division of the property had not yet arrived—the life estate of Frances Holiday being not yet determined by her death."

This decision complainant brings up to this Court for review.

LYON, for plaintiff in error, cited—

2 *Jarman*, 156. 2 *Bl. Com.* 180, 39. 4 *Kent*, 357. 3 *Bro. Ch. Rep.* 25. 3 *Ves.* 208, 630. 1 *Atkyns*, 541.

S. T. BAILEY, for defendants, cited—

3 *Ves.* 628, 632. 4 *Bro. Ch.* 15. 9 *Ves.* 197, 456. *Powell on Dev.* 705. 3 *Bro. C. C.* 215, 367. 1 *M. & S.* 165. 2 *P. Wms.* 280, 3 *Bro. Parl. Cas.* 104. 3 *Atkyns*, 524. 1 *Ves.* 405. 2 *McC. Ch.* 256, 440. 1 *Hill's Ch.* 322. 4 *Paige*, 47. 4 *Russ.* 70. 1 *Ball & B.* 483. 15 *Ves.* 125. 5 *Madd.* 335. 6 *Ves.* 300. 10 *Id.* 566. 3 *Madd.* 416. 2 *Fearne*, 386, 401. 2 *Jarm.* 111. 2 *Vernon*, 705. 1 *Beav.* 697. 1 *Hill's Ch.* 163. 2 *Fearne*, 55, 150. 1 *Jarman*, 762. 12 *Ves.* 75. 3 *Id.* 10. 3 *Merivale*, 382. 4 *Bro. C. C.* 15.

By the Court.—WARNER, J. delivering the opinion.

[1.] The main question involved in this case is, the proper construction to be given to the second clause of the testator's will.

For the plaintiff in error, it is contended, that it was the intention of the testator, that the property should be held by his three daughters for life, severally, by respective shares, and as each of them should die, the part of the one so dying, should be divided between her children, except Elizabeth Russell's share, which, in the event she died childless, was to be divided between the children of the other two; but in no event was the survivor of his three daughters to have the possession of all the property.

For the defendant in error, it is insisted, that the testator never intended, by any fair construction of his will, that the property should be divided between his grand children, until after the death of his last surviving daughter.

Elizabeth Russell died childless, and Jarva Lane is also dead, leaving six children. Frances Holiday is yet living, and has children.

This bill is filed by one of the children of Jarva Lane, by her guardian, to recover the one-sixth part of one-half of the property bequeathed by the testator, under the second clause of his will. The second clause of the testator's will is in the following words:

"I lend the following negroes, Esther, Eliza, Fanny, Milly, Sarah, Jinsey, Frank, John, Hannah and little Esther, with all their increase, to Frances Holiday, Elizabeth Russell and Jarva Lane, children of my first wife—this loan to continue during their natural lives, and at their death, the property to be equally divided among the children of Frances Holiday and Jarva Lane; and in the event of Elizabeth Russell having child or children, they also to have one-third part, but if the above named Elizabeth Russell die childless, the whole of the property then, shall go to the children of Frances Holiday and Jarva Lane. It is my desire, that John, a negro boy, (one of the negroes mentioned in this article,) should go into the possession of Jarva Lane, and be considered so much of her part. It is my desire, also, that no part of the above mentioned property shall come into the hands

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or possession of James Russell, the husband of Elizabeth Russell, but *it shall be held* by Frances Holiday and Jarva Lane, and to go to their children, if James Russell should survive his wife, Elizabeth Russell."

Taking the whole of this clause of the will together, and we think it was manifestly the intention of the testator, that this property should remain in the *possession* of his daughters, or the survivor of them, until their death, and then be equally divided between his grand children.

The testator evidently contemplated that his daughter, Elizabeth Russell, might die without children—an event which has happened—and one leading object with the testator was, to keep the property out of James Russell's hands or possession; hence, he directed *it to be held* by Frances Holiday and Jarva Lane, until *their death*, and then to be equally divided between their children. But it is contended, that the testator directed that, in the event Mrs. Russell had children, they should have one-third part of the property; and that expression denotes that it was the intention of the testator, that his grand children should take, *per stirpes*, and not *per capita*. But how does that expression, in any manner, interfere with the *time* fixed, by the testator, at which the property was to be divided?

The *time* at which the property was to be divided among the testator's grand children, is one question, but in what *proportions* it shall be divided, is another and a very different question. The same remark may be made in regard to the negro boy, John. The boy, John, was to go into the *possession* of Jarva Lane, as part of her *life estate* in the property; that is to say, the testator expressed his desire that Jarva Lane should have the *possession* of John. The life estate in this property was to remain in the *possession* of his three daughters, or the survivor of them, until *their deaths*, and then to be equally divided among their children. Suppose Elizabeth Russell had been the survivor of the testator's three children, could the children of the other deceased daughters have compelled a distribution before her death? Certainly not; and for the reason that she might have children before her death, who would be entitled to a part of the property. Frances Holiday being the survivor of the testator's three daughters, she is entitled to the *possession* of a life estate in the property, and at

her death, the grand children of the testator will take, under the will of the testator, and not through their respective mothers.

Whether the grand children will take under the will, *per capita*, or *per stirpes*, we leave an open question, to be decided when the death of Frances Holiday shall authorize a division of the property to be made, according to our construction of the testator's intention.

Let the judgment of the Court below be affirmed.

No. 14.—BERNETT ADAMS, plaintiff in error, vs. GAZAWAY B. LAMAR, defendant.

- [1.] The jurisdiction of the Courts of this State is co-extensive with its sovereignty, and that is limited only by its territory, and it therefore attaches upon all the property and persons within the limits of the State; yet it is to be so exercised as to conclude by judgment none but those who are parties.
- [2.] The Courts of this State have no extra territorial jurisdiction, and cannot make the citizens of foreign States amenable to their processes, or conclude them, by a judgment, *in personam*, without their consent.
- [3.] A foreign citizen may waive his exemption, and submit to the jurisdiction; and in that event, he will be concluded by the judgment.
- [4.] A files his bill against B, who is a citizen of New York—setting forth an agreement, by which B stipulated to give to A one-third of certain lands, to which B holds the legal titles, in consideration of services rendered, and information furnished to B by A, relative to the lands, and which was the inducement of B's purchase of them—and asks an assignment to A of the one-third of the lands, and a conveyance of titles to the same, by B to A—service of the bill being perfected on B's agent in this State: Held, that upon this bill, a Court of Chancery could not decree against B, because of the want of jurisdiction over him, a citizen of a foreign State.
- [5.] When a foreign citizen appears, and by counsel pleads to the jurisdiction, he is not held to have waived his exemption by appearance. Appearance and pleading or answering to the merits, held to be a waiver of his exemption, and an assent to the jurisdiction.

Application for injunction, Baker Superior Court. Before Judge WARREN, at Chambers, December, 1849.

The decision complained of in this case, is the refusal of the Court to grant an injunction. The bill was filed by Bennett Adams, alleging, that in 1839, complainant and one John T. Lamar entered into an agreement and partnership, to purchase and grant some of the lots of land in Baker, Early and Decatur counties, which had reverted to the State. It was agreed that Adams should examine the lots, and report to Lamar such as were valuable, at his own expense; and Lamar was to pay the grant fees into the treasury, and take out the grants in his own name; Adams, for his trouble, having an interest of one-third in the lots thus granted, or one-third of the actual value of the land, as he might choose. The bill charged that, at great expense, Adams proceeded to examine the lands, and reported to said John T. Lamar, about *eighty* lots of great value; that said John T. Lamar, being unable to pay the grant fees, Gazaway B. Lamar stepped into his place, and advanced the money—taking out the grants in his own name, and agreeing to account to Adams, on the same terms as provided in the original agreement with John T. Lamar. The bill farther alleged, that John T. Lamar was dead, and Gazaway B. Lamar resided without the State of Georgia; that said Gazaway had advertised all of these lands for sale, at public outcry, at Milledgeville, on the first of December, 1849; that the complainant elected to take the one-third interest in the lands, and that the sale by Lamar would greatly injure the complainant; that the complainant desired to have the land admeasured, and one-third part assigned to him, and that Lamar be compelled, after such assignment, to convey the same to him. The prayer of the bill was for a partition of the lands, and an injunction restraining Lamar from selling the same.

The Court granted an order, appointing a day for the hearing of the application; and, in the meanwhile, ordered a copy to be served on the agent of Lamar in Georgia, and publication of the application in a public gazette.

On the hearing of the application, Lamar appeared, by his solicitor, and showed cause why the injunction should not be granted; among other grounds, because the Court in Baker County had no jurisdiction over the defendant, who, by the bill, was shown to reside out of the State.

The Court sustained this objection and refused to grant the injunction, and complainant excepted.

R. F. LYON, for plaintiff in error, cited—

Dearing vs. The Bank of Charleston, 5 Ga. Rep. 503. *Story's Eq. Jur.* §§486, 487, 489, 646, 658. 1 *Atkyns*, 544. 1 *Ves.* 303. 2 *Paige's R.* 402. 5 Ga. Rep. 341.

E. H. PLATT and CHAPPELL, for defendant in error, cited—

2 *Story's Equity Jurisprudence*, §§743, 1291. 1 *Kent*, 343. 3 *Story on Const.* §§1631, 1684 to 1686, '89, '9, 1293. *Penn vs. Lord Baltimore*, 1 *Ves. Sr.* 447. *Earl of Kildare vs. Eustice*, 1 *Vernon*, 421. *Toller vs. Carteret*, 2 *Vernon*, 494. *Massic vs. Watts*, 2 *Cond. Rep.* 332. *Cranston vs. Johnson*, 3 *Ves. Jr.* top page, 182. *Jackson vs. Petrie*, 10 *Ves.* top page, 164. *Mead vs. Mexrit*, 2 *Paige*, 404. *Mitchell vs. Bunch*, *Id.* 614. *Stephen vs. Fowler*, 2 *Paige*, 280. *Bissell vs. Briggs*, 9, *Mass. Rep.* 468. *Packling vs. Ex'rs of Bird*, 13 *Johnson*, top page, 207. 6 *Wend.* 452. 5 Ga. Rep. 519. *Mays & Shivers vs. Taylor*, 7 Ga. Rep. 242.

By the Court.—NISBET, J. delivering the opinion.

Whether the Court below erred in dissolving this injunction, depends upon the character of the case made in the bill. To determine its character, we are to look to the bill itself—to its allegations and its prayer. It appears, then, from the statements in the bill, that an agreement was entered into, between the complainant and one John T. Lamar, then of the County of Bibb, and now deceased, for the granting of lands which, by Act of the Legislature, were declared forfeited, and which were authorized to be granted to any person who might come forward, after a time limited, and pay into the State treasury the grant fees. By that agreement it was stipulated, that the complainant should, at his own expense, explore the country, examine the lands, and report to John T. Lamar, such lots as he might believe valuable and desirable to be granted, for speculation. It was farther stipulated, that John T. Lamar should, on his part, grant the lands and pay the office fees; and farther, that in consideration of the services so to be rendered by the complainant, the parties stipulated, that

he should have *one-third interest* in all the lands granted, or one-third the actual value of them. The bill proceeds to charge, that the complainant entered upon and discharged the duties which were devolved upon him by the agreement, and did, in fact, examine and report to John T. Lamar, a vast number of lots of land, lying in the County of Baker and other Counties, all of which are set forth; and that John T. Lamar, not being in funds, or from some other cause, did not, himself, grant the lands, but instead, communicated the information which had been furnished him by the complainant in relation to them—their numbers, quality, location, &c.—to the defendant, Gazaway B. Lamar, who was, at the time, a citizen of Georgia, but who, the bill admits, was, at the time of suing it out, and still is, *a citizen of the State of New York*; and, at the same time, communicated to him the terms of the agreement between himself (John T. Lamar) and the complainant. The bill farther states, that the defendant, Gazaway B. Lamar, was induced by the said John T. Lamar, to “step into the place of him, the said John T. in said operation; advance and pay into the treasury the grant fees for the lands which he might, from time to time, and altogether, grant, in pursuance and in consequence of the information afforded by your orator, in consideration aforesaid; take the grants directly to himself, instead of to the said John T. for whose benefit, really, the said investment was made by the said Gazaway B.; give to your orator a one-third interest in such lands as he should grant on the information aforesaid, or pay to your orator the one-third of the actual value of said lands.” After this recital, the bill charges, “All of which your orator believes and charges that the said Gazaway B. agreed to do.”

The complainant avers, that he did grant the lands named in the bill, and take the titles in his own name. It (the bill) farther sets forth, that Gazaway B. Lamar, through Mr. Edwards, his agent, had advertised the lands for sale at Milledgeville. It charges, that such sale would be greatly prejudicial to the interest of the complainant, in the lands, and *elects* the one-third interest in them, under the contract, instead of one-third the actual value. It also charges, that the complainant, “desires to have the said lands admeasured, laid off, and valued by fit and proper persons for that purpose, and his one-third part thereof set apart, laid off and assigned to him by such persons, so that he may have the pre-

sent enjoyment thereof, and that the said Gazaway B. may be compelled, by a decree of this Court, after such assignment and admeasurement, to convey to your orator such part and parcels as may be assigned to him, that he may have the legal as well as equitable title to said lands—the present enjoyment, as well as the hope and expectancy thereof.” It farther charges, that Gazaway B. Lamar, having availed himself of the information furnished by the complainant, and all the benefits of the contract between him and John T. Lamar, is, in equity, bound to fulfil the obligation assumed therein by the said John T.; that is, to let him, complainant, have the one-third interest in the lands, and that he holds the one-third interest in the lands in trust for the complainant. The prayer is, first, for an injunction against the sale; second, that the Court “have assigned to the complainant the one-third part of the said lands, in such way as shall seem fit;” and, third, for general relief.

Such is the bill—the primary object of which is the injunction which issued, and was dissolved, upon notice and motion, at Chambers. The order dissolving the injunction is the judgment excepted to. It is sought to be sustained, before this Court, upon the ground that the Court below, in the case made by the bill, had no jurisdiction over the defendant, Gazaway B. Lamar, a citizen of New York. Whether it had jurisdiction for the purpose of the injunction, must depend upon the question, whether it had jurisdiction, for the purpose of the ultimate relief sought by the bill; for it is manifest, that if the Court could not grant the decree which is asked by the bill, for the want of jurisdiction, it could not enjoin the sale of the lands. So, the question now is, whether, in this case, according to the allegations in the bill, the complainant could, upon the hearing, have the relief he asks against Gazaway B. Lamar, who was, at the time of suing out the process, and who now is, a citizen of New York? Again, there recurs the inquiry, what is the character of the complainant's bill? There are two aspects presented by the bill. It is either a bill to enforce the agreement, and to decree the execution of titles to one-third of this land, or it is a bill for partition. In either event, our judgment is, that the Court had not jurisdiction.

The prayer alone cannot characterise a bill; for that derives its character from the allegations in the bill. It must be consistent with the bill, or it is nugatory. It may fall short of the case

made, or it may exceed it. In the latter event, its excess amounts to nothing. I apprehend, that if the specific prayer falls short of the relief which the charges in the bill demand, under the prayer for general relief, the Court could grant relief co-extensive with such charges. Now, here the specific prayer is for an assignment of one-third of the lands in question, to the complainant. Judging the bill by this prayer, it would seem to be a bill for a partition and assignment; but the general prayer covers all the relief which the allegations in the bill would permit—so that we are not to characterise the bill by the special prayer alone. So far as the prayers are *indicia* of what the case is made in the bill, we must consider them together; and the special and general prayer, taken together, are co-extensive with the allegations in the bill. Upon them we are, therefore, thrown, to ascertain what it is that the complainant wants—what kind of case he makes. He sets forth an agreement, entered into by the defendant, by virtue of which he, the defendant, stipulated to John T. Lamar, to give to the complainant, one-third interest in the lands which were granted by him, or one-third their actual value. He elects to take the one-third interest, assuming that the alternative is for his benefit. The agreement, then, set up in the bill is, *that in consideration of the services rendered, and the information relative to the lands, afforded by him, Gazaway B. Lamar undertook to give complainant the one-third interest in them.* This is the gravamen of his bill—this the foundation of his action. Without this, he obviously would have no case in Court of any kind; and it seems to me, that the averments which follow, taken in connection with this agreement, establish the character of this action, and demonstrate it to be, a bill filed to procure a decree against the defendant, that he execute titles to the one-third of the lands, in pursuance of this agreement. Parenthetically, I remark, that other and very grave questions might arise on this bill, if it were retained until the hearing. I discuss only the one made in this record, to wit: the question of jurisdiction. The complainant does not claim to have even an equitable title to this one-third, except by implication. He distinctly admits that the legal title is in the defendant. The interest which he claims, is not a title in equity which he has bought, or which has passed to him by contract, or which has otherwise devolved upon him. His bill shows no such title—no legal, equitable or legal, of any portion of these.

lands. The contract which it exhibits is, as to the defendant, an executory contract, for a breach of which an action would lie at Law, or for the specific performance of which a decree might be had in Equity. The latter experiment, it seems to us, he has made. Aside from other considerations, we infer this from the legal effect of the agreement which he has set up in his bill. If he, by his own showing, is not seized, either in Law or in Equity, of the one-third of these lands, he cannot come into Equity for a partition; and, because he cannot, it is a fair inference that he does not come here for that purpose. The most significant and characterizing averment in this bill is that which charges a right, expressed in the form of a desire, to have the lands admeasured, laid off and valued, and his one-third set apart, laid off, and assigned to him, and *that the defendant be compelled, by a decree, to convey to him the part so assigned*. Whatever else is demanded, this is a distinct demand for a decree for a conveyance—for the enforcement of the agreement—for the execution of titles. This demand is consistent with the agreement, and the prayers of the bill are in harmony with it; for whilst, under the special prayer, an assignment, it is true, is asked, yet, under the general prayer, the execution of titles might be decreed. Again, it is charged, that the defendant is bound, in equity, to fulfil the obligation assumed in the agreement by John T. Lamar, and to *give him* (convey to him) the one-third of the lands. He asserts a right by charging an obligation. The right is to have the agreement carried into effect according to its stipulations. Whilst, therefore, it must be admitted, that this bill has a double aspect, yet the fairest construction, I think, must needs make it a bill to compel Gazaway B. Lamar to comply with the contract, by executing to the complainant a title to the one-third of these lands. If it is, it is a bill asking a decree, *in personam*, against the defendant, who is a citizen of another State. Has a Court of Chancery in Georgia, for such a purpose, jurisdiction over a citizen of New York? Beyond all question it has not. The question, whether a citizen of a foreign State, could be made a party to a cause in the Courts of Georgia, without his consent, so as to bind him by a judgment, *in personam*, was made before this Court, in the case of *Dearing et al. vs. The Bank of Charleston*. That cause was argued by the most eminent gentlemen of the profession in the two States of South Carolina and Georgia, and received the most se-

rious consideration which we could bestow upon it. With the principles settled in it, we are well satisfied, and I am, therefore, relieved from a full discussion, in this case, of the interesting question of jurisdiction. Assuming, now, that the object of this bill is to procure a decree, *in personam*, against the defendant, a citizen of New York, the single point is, have the Courts of Georgia jurisdiction? This case falls within no exception to the rules laid down in *Dearing vs. The Bank of Charleston*. The question there, was the question here. I shall, therefore, state simply the principles settled in that case, and leave this branch of this cause. It was settled in *Dearing vs. The Bank of Charleston*—

1. That there is no Statute Law of Georgia, which authorizes citizens of a foreign State to be made parties to proceedings in our Courts, without their consent, and to conclude them by a judgment, *in personam*.

2. That the Act of 5 George II. is, in its spirit, of force in Georgia; but that it applies to citizens of the State who abscond, or depart from the State to avoid service of process, or to citizens of a foreign State, who, having been in the State, depart therefrom for the purpose of avoiding service of process.

3. That the property of a citizen of a foreign State is subject to the jurisdiction of our Courts, if within the limits of the State, and may be applied, both at Law and in Equity, to the payments of his debts.

[1.] 4. That the jurisdiction of the Superior Courts of Georgia, is co-extensive with its sovereignty, and that is limited only by its territory, and it therefore attaches upon all the property, personal and real, and the persons within the limits of the State, yet it is to be exercised so as to conclude none by judgments except those who are parties.

[2.] 5. That the Courts of this State have no extra-territorial jurisdiction, and cannot make the citizens of foreign States amenable to their process, or conclude them by a judgment, *in personam*, without their consent; and a judgment, *in personam*, against a citizen of a foreign State, in a cause wherein he did not appear, although notice was served upon him by publication, under the 2d Equity Rule, is a nullity.

[3.] 6. That a citizen of a foreign State may waive his exemption from the jurisdiction of our Courts, and come in and defend,

and in that event he would be concluded by the judgment of our Courts.

[4.] Suppose, however, that this bill be viewed in the light of a proceeding in Equity to partition lands—and it is so claimed to be by the complainant—still it is obnoxious to the exception, that in the case made by the bill, the Court has no jurisdiction. In this State, by the Act of 1767, the mode of partitioning lands, held in coparcenary, joint tenancy and tenancy in common, is prescribed. It is by petition to the Superior Court, and exhibition of title. The Court is required to *examine the petitioner's title*, and *thereupon* to issue a writ of partition. There must be a *legal title* in the applicant—he must show a *seizin* in coparcenary, joint tenancy or tenancy in common. The partition, when made, becomes the judgment of the Court, and, therefore, without more, the partitioned property vests; and so it is by the Common Law writ of partition. These operate by judgment of the Court. Notwithstanding this statutory remedy for partitioning, Equity has jurisdiction over this subject matter also. “It is (says Mr. Story) upon some or all of these grounds—the necessity of a discovery of titles—the inadequacy of a remedy at Law—the difficulty of making the appropriate and indispensable compensatory adjustments—the peculiar remedial processes of Courts of Equity, and their ability to clear away all intermediate obstructions against complete justice—that these Courts have assumed a general concurrent jurisdiction with Courts of Law, in all cases of partition.” *Story's Eq.* §658.

It is not my purpose to enter into a minute survey of the grounds of this jurisdiction. It is admitted that Equity has jurisdiction over the partition of lands; and it is well settled that Equity will decree a partition on an equitable title. *Lord Hardwick in Cartwright vs. Pulteney*, 2 *Atk.* 380. *Story's Eq.* §653. *Coxe vs. Swain*, 4 *John. Ch. R.* 276.

But in no case will a Court of Equity decree a partition, unless there is a title in the applicant, either legal or equitable. Now if, in this case, there was no controversy about the jurisdiction—if Gazaway B. Lamar was rightly before the Court—it is extremely doubtful whether a Chancellor could, upon the title set up, (an interest merely in an executory contract,) proceed to decree a partition—decree that he could not, without first ascertaining, by a preliminary issue and decree, the complainant's title.

I am strongly inclined to the opinion, that it would be his duty to remit the complainant to his proceeding to enforce the contract and get a title, before he could entertain the bill for partition. *Then*, unless other causes should make it necessary, he would not be compelled to go into Equity for partition—he could proceed under the Statute at Law. It does seem to me, that when the complainant in this case admits, that the legal title to all these lands is in the defendant, and shows no relation in Equity or at Law to the defendant, as coparcener, joint tenant or tenant in common, but only shows a contract to convey, on the part of the defendant, he has effectually closed the doors of Chancery against himself.

But with a view to the question of jurisdiction, I inquire, what is the *modus operandi*, upon a bill in Chancery, when that Court decrees a partition of lands? “In cases of partition of estates, if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceedings at Common Law, have led to applications to Courts of Equity for partitions, which are effected, by first ascertaining the rights of the several persons interested, and then issuing the commission required, and upon the return of the commissioners, and confirmation of that return by the Court, the partition is finally completed by mutual conveyances of the allotments made to the several parties.” *Lord Redesdale. Mitford's Pleadings in Eq. by Jeremy*, 120. *Lord Eldon, in Agar vs. Fairfax*, 17 *Vesey*, 531. To a partition, then, in Equity, according to Lord *Redesdale*, three things are necessary—

1. That the rights of the parties be ascertained;
2. That the return of the commissioners be confirmed; and
3. That the parties mutually convey to each other.

The first and second are material here to notice. It is first necessary, that the rights of the parties be ascertained. That is, that the complainant show his title, and the defendants exhibit theirs. This is the first issue made, and it is upon this issue that the first and preliminary decree is founded—a decree which *adjudges the rights of the parties*. This is a decree *in personam*—it does not act upon the property—it is not a partition. It acts upon the parties—it adjudges—*ascertains* (in the language of Lord *Redesdale*) their rights in the property. It is after, and in consequence of this decree, that the commission issues; and the action

of the commissioners, and its confirmation by the Court, is, in fact, the partition. When this is done, a final decree is necessary, and that is, that the parties execute conveyances. That also, is a decree *in personam*—a decree which can be enforced only by those punitory powers with which Chancery is armed, to compel obedience to its orders. It is sufficient for my purpose, if I have shown, and I submit that it is shown, that Equity could not partition the lands in this case, without rendering a decree *in personam* against the defendant. For this purpose, as before shown, the Courts of Georgia have no jurisdiction over him. Suppose, then, that the Court proceeds upon this bill. It would be necessary to ascertain the complainant's rights as against the defendant, under the contract set up under the bill, and decree accordingly, and decree farther, that defendant convey to him. He is not before the Court—it has no process to bring him there—its processes run not into New York. These decrees would be rendered, in the expressive language of the books, *behind his back*—in violation of the comity of States—of the sovereign rights of New York—and would be but a sounding brass and a tinkling cymbal. The decree which ascertains the right of the complainant to a partition, must necessarily precede the appointment of commissioners. No Court would, upon the averments in the bill, without proof, award a partition; and whenever it makes an issue on those averments, it is a personal issue; and whenever it decrees upon that issue, it is a judgment *in personam*. I do not deny the jurisdiction of a Court of Chancery over the lands within the limits of the State, for the purpose of partition, owned by a non-resident, and others who reside within the State. As, if lands are held in partenary, joint tenancy, or tenancy in common, by A, B, and C, and C resides out of the State. In such case, if, on any account, it became necessary to go into Equity, that Court would no doubt partition, as between the parties within the jurisdiction, and its judgment would conclude them; but it would not bind C, who is not before the Court. *Story's Eq.* § 656. 17 *Vesey*, 544. *Dearing vs. The Bank of Charleston*. 5 *Geo. R.* 497. In such a case, if the petitioner's title was clear, a *Court of Law* would proceed to partition, and let him into possession, leaving the non-resident to assert his rights.—Nay, more; I think it is clear, that, if two are joint tenants, or parteners, or tenants in common, of lands within the State, and

one is a non-resident, upon exhibition of his title, and that being clear, a *Court of Law* would partition, at the instance of the resident citizen. But when the right to a partition, as against a non-resident, depends upon an *equitable title*, to be ascertained by a decree, and there are no parties but the claimant and the non-resident, (which is this case,) I am well assured that Chancery would decline the jurisdiction. It would advise the complainant to resort to the tribunals holding jurisdiction of the person of the foreign citizen, and having there established his title, and procured his deed, return, and ask and receive a partition. That the Courts of New York, and the Circuit Court of the United States, are open to this complainant, to enforce this contract against *Gazaway B. Lamar*, there can be no doubt. He is not, therefore, remediless. If his claim, as set forth in this bill, be sustainable, he can there enforce a title to his one-third interest in these lands, and having done so, he can enforce a partition here. *Penn vs. Lord Baltimore*, 1 *Vesey*, Sr. 446. *Earl of Kildare vs. Eustace*, 1 *Vernon*, 419. *Toller vs. Carterlet*, 3 *Vernon*, 494. *Masie vs. Watts*, 6 *Cranch*, 148 to 170. *Cranston vs. Johnson*, 3 *Vesey*, Jr. 182. *Jackson vs. Petrie*, 10 *Vesey*, 164. *Mead vs. Merrill*, 2 *Paige*, 404. *Mitchell vs. Burch*, *Ib.* 614. 3 *Story's Com. on the Constitution*, §§1631, 1684 to 1686. *Story's Equity*, §§743, '4, 899, 1293.

[5.] The defendant, upon the motion to dissolve the injunction, appeared by counsel, and insisted upon its dissolution upon several grounds, but mainly, because the Court had no jurisdiction over him, being a citizen of New York; and it is argued before us, that, having appeared, he waived his exemption thereby from the jurisdiction of the Court, and would be bound by its judgment. It is the privilege of a foreign citizen to waive the want of jurisdiction over him, in the Courts of Georgia. He may come in and submit to the jurisdiction and plead, and would, in that event, be concluded by a judgment *in personam*. Mr. Story, in *Piequet vs. Swan*, says, "If the party chooses to appear, and take upon himself the defence of the suit, that might vary the case, for he may submit to the local jurisdiction, and waive his personal immunity." 5 *Masell R.* 43, '4. In *Dearing vs. The Bank of Charleston*, we say, "It has been already intimated, that if a citizen of a foreign State should appear and defend a suit, and a judgment *in personam* be rendered against him, he

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would be concluded by it. He may waive his exemption from the jurisdiction, and being heard, could aver nothing, in any tribunal, against the judgment. 5 Geo. R. 519. But what is it to appear and defend? He must appear and plead, or answer, to the merits, submitting voluntarily to the jurisdiction. When he does appear, upon what principle is it that he will be concluded by the judgment? It is upon the principle of consent that it shall bind him. He *elects* to litigate his rights in that forum, and therefore can aver nothing against the judgment which it renders. The record in such a case, I apprehend, should furnish evidence of this consent. Pleading to the merits, and a judgment on the pleading, would evince his consent. But if, on the contrary, the record should disclose a plea to the jurisdiction—*dissent* to the jurisdiction—he could aver against the judgment; it would not bind him. In this case, upon a motion to dissolve, the defendant, by counsel, resists the jurisdiction. He solemnly disclaims it. He *asserts* his immunity. He claims the protection of a foreign sovereignty, against the local jurisdiction. He exclaims, upon the record, as the Roman did under the scourgings of *Verres*, “I am a Roman citizen.” And all this upon an interlocutory motion, before the case has reached its merits. Strange absurdity, that the very act of resisting the jurisdiction, should be held an assent to it.

Let the judgment be affirmed.

No. 15.—GEORGE S. OGLESBY, plaintiff in error, vs. W. W. GILMORE, administrator, &c. defendant.

[1.] Where the Circuit Court misinterprets the decision of the Supreme Court, on a former hearing, the cause will be remanded, with instructions.

In Equity, in Lee Superior Court. Before Judge WARREN, November Term, 1849.

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When this cause was previously before this Court, (5 Ga. Rep. 56,) it was remanded, with instructions, "That the administrator, *de bonis non*, file his bill within a reasonable time, against both the parties now before the Court, in which all concerned may litigate; and failing or refusing so to do, it is further *Ordered*, that the funds in the hands of the receiver be paid over to George S. Oglesby."

A motion being subsequently made in the Court below, to dissolve the injunction, on the coming in of the answer, and that the money in the hands of the receiver be paid over to Oglesby, the presiding Judge refused the same, upon the ground that such an order would be inconsistent with the instructions of the Supreme Court.

This decision was excepted to, and the cause brought up for the purpose of obtaining a construction of this Court upon its own order.

H. Holt, for plaintiff in error.

E. R. Brown, for defendant.

The following order was entered in this case:

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This cause came before the Court, upon a bill of exceptions and transcript of the record, from the Superior Court of Lee County; and after argument of counsel heard thereon, it is considered and adjudged by the Court, that the order of the Court below be reversed, and a re-hearing had, upon the ground that the Court erred, in holding that it was controlled, in the premises, by the instructions sent down from this Court, in the case of *Oglesby vs. Gilmore and others*, decided at the Americas Term, 1848; its intention being to hold up the fund, in the hands of the receiver, for a reasonable length of time, fully for the purposes of the litigation therein contemplated; and should the administrator, *de bonis non*, interplead, as he has done, then to place the disposition of the fund in controversy, entirely at the discretion of the Chancellor, untrammelled by the authority of this Court.

No. 16,—BENJAMIN O. KEATON, plaintiff in error, vs. ELIZABETH M. M. GREENWOOD, defendant.

- [1.] Courts of Equity have jurisdiction to compel trustees to account for the trust funds in their hands, especially when the accounts are complicated, and from the facts alleged in the bill, it affirmatively appears, a discovery from the defendant is necessary to obtain a decree.
- [2.] The Statute of Limitations does not begin to run against *express trusts*, created by the act of the parties, or by the appointment of the law, so long as the trust continues, and is acknowledged to be a *continuing, subsisting trust*, for the reason, that the possession of the trustee is the possession of the *cestui que trust*; but when the trust is denied by the trustee, and he claims to hold the trust funds or the trust property, as his own, *adversely* to his *cestui que trust*, the latter having *knowledge* of that fact, the Statute will begin to run in favor of such express trustee from the time of such *adverse* claim or possession.
- [3.] The Statute of Limitations will begin to run against *implied trusts*—as, where a party claims title to property in his *own right*, and is sought to be converted into a trustee by the decree of a Court of Equity—the Statute will begin to run in his favor, from the time of his possession, in the same manner as it would do in a Court of Law; for the reason, that his possession never was the possession of the alleged *cestui que trust*—the relation of trustee and *cestui que trust* never, in fact, exists between them, until the decree of the Court establishing that relation.

In Equity, in Baker Superior Court. Decision on demurrer, by Judge WARREN, December Term, 1849.

Elizabeth M. M. Greenwood filed a bill, in Baker Superior Court, against Benjamin O. Keaton, charging that, in 1835, her affections became estranged from her husband, by reason of his cruel treatment, and being far away from her kindred and friends, with no one to guide her in the paths of virtue, she was ensnared by the assiduous kindness and attentions of Benjamin O. Keaton, who at length succeeded in enlisting her affections; that being thus entangled, she soon lost her virtue, honor and chastity; that a separation from her husband followed, and soon a divorce was granted to him; that her husband then turned over to her, for a permanent support, about \$10,000; that having unlimited confidence in Keaton, and being cut off from all connection with the virtuous and respectable, and knowing Keaton to be a shrewd and money-making man, she delivered to him the whole of her

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property, in especial trust and confidence, directing and requesting him to use the money, as her agent, for her use and benefit, in whatever way he deemed best and most conducive to her interest; that he received it, promising to account to her, whenever requested, for the principal and whatever profits he might make; that Keaton immediately placed the fund into active and profitable operation, by shaving notes at heavy discounts, purchasing lands and negroes, which he re-sold at large profits, and finally investing in land and negroes, which he worked to great advantage; that by these and like means, the fund rapidly increased until it amounted to the sum of \$50,000; that the particular numbers of the land, the names and number of the negroes, the obligors of the notes, bonds and specialties, and the respective amounts thereof, the said Benjamin O. has fraudulently and in bad faith, withheld from complainant, and concealed, under his own name, when he should have used the name of complainant, as his *cestui que trust*.

The bill farther alleged, that in May, 1849, complainant demanded an account and settlement, which he refused, under various pretences; among others, that he had paid complainant in lands—whereas, she alleged, that pending a suit filed by her former husband against Keaton, for *crim. con.* Keaton, pretending to fear the issue of the suit, made a deed to complainant for a number of lots of land in Baker and other Counties, the value of which she did not know, or care to know, inasmuch as the deed was made merely for her protection, should the said suit end disastrously; that after the termination of the suit, which was favorable, as Keaton found sale for the land, or whenever he wished, he called for the deed, and erased therefrom, with the form of her consent, such lots as he chose—complainant taking no thought about it, as her confidence in him was unbroken, and his influence over her unlimited; that at one time he gave to her a negro woman, worth about \$600, as he said, for one of the lots of land; what became of the proceeds of those erased from the deed, she did not know or care, never conceiving that she had any title therein; that he had thus erased all the lots, save three, and they were valueless.

The bill farther alleged, that Keaton pretends he has a receipt in full, whereas, the truth was, that sometime in November, 1844, he told complainant, in the presence of witnesses, brought by

him, that he wanted to settle with complainant in relation to said lands. Unsupported by a friend, and withal having the same trusting confidence in him that had led her from the paths of virtue—being still his weak, though willing victim—she told him to settle; that Keaton then said, that he owed her only \$180, and gave her a note for that amount on one Denuard; that he then presented her a paper to sign, which she did, not knowing its contents, but has since understood that it was an acknowledgment that he had fully accounted to her for the lands erased from the deed; that he made no account of his actings and doings, and that he procured this paper fraudulently, and in violation of the faith, trust and confidence reposed in him.

The bill farther alleged, that the negro woman, the note for \$180, a house and lot in Albany worth \$300, and the valueless land not erased from the deed, constitute all that complainant ever received from Benjamin O. Keaton, for the funds entrusted to his care; and that she never discovered the gross frauds practised by Keaton, in taking the receipt, or of his intention to refuse to account fairly with her, until shortly before the filing of her bill, and within that year, (1849.)

The prayer was for an account.

To this bill was filed a general demurrer for want of equity, and also a special demurrer, setting up as a defence the Statute of Limitations.

The Court overruled the demurrer, and Keaton, by his counsel, excepted:

H. MORGAN, for plaintiff in error, cited—

R. Thomas vs. Brinsfield, 7 Ga. Rep. 157, '8. *Angell on Limitations*, 174, '5. 7 Johns. Ch. R. 110. 1 Fonb. Eq. 246 and note. *Bouvier's Law Dic.* 605. 4 Kent's Com. 295. *Sanders on Uses and Trusts*, 6. *Cooper's Eq. Plead. Intro.* 27. *Blac. Com.* 431. *Fonb. Eq. Pl.* 246. *Watts & Serg.* 95. *Bou. Law Dic.* 605. 2 *Story's Eq.* 1195. 2 *Blac. Com.* 327 to 338. 3 *Blac.* 431. *Cooper's Eq. Pl. Intro.* 27. 4 *Kent's Com.* 295. 2 *Fonb.* 333. *Hill on Trustees*, 60. *Addington vs. Conn.* 3 *Atk.* 151. *Start vs. Mellish*, 2 *Atk.* 612. 2 *Story's Eq.* 970. *Lewin on Trusts and Trustees*, 7, 8, 9 and note. 2 *Story's Eq.* 964. *Cromps vs. Coleman*, 9 *Ves.* 333. *Lewin on Trusts and Trustees*, 44.

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Hill on Trustees, 65, '6. *Ib.* 66, '7. *Lewin on Trusts and Trustees*, 77, '8. 2 *Story's Eq.* 1195 and note. *Ib.* 1069, 1070 and note. *Ib.* 973. *Ib.* 1195. *Lewin on Trusts and Trustees*, 16. *Philips vs. Bryde*, 3 *Ves.* 120, 127. *Story on Agency*, pp. 2, 3, 4, 5, and §226. 1 *Story's Equity*, 464. 7 *Ga. R.* 207. *Ib.* 206. 1 *Story's Eq.* 71. *Acts of Legislature*, 1847, p. 197. *Story on Bail*, 2, 3, 101, '2, '4, §§141, '5 to 157, and p. 112. 2 *Story's Eq.* §1041. *Story's Eq. Plea.* 23, 242. *Misford's Eq. Plea.* 37, 41. *Cooper's Eq. Pl.* 5. 2d edit. of *Wigram on Discovery*, 125 to 133. 4 *Johns. Ch. R.* 437. 1 *Story's Eq.* 187. *Coster vs. Murry*, 5 *Johns. Ch. Rep.* 522. *Troup vs. Smith*, 20 *Johns. R.* 33. *Leonard vs. Pitney*, 5 *Wend. N. Y. Rep.* *Allen vs. Mille*, 17 *Ib.* 202. *Miles vs. Barry*, 1 *Hill, S. C.* 296 or 96. *Mass. Turnpike vs. Field*, 3 *Mass. R.* 201. *Horner vs. Fish*, 1 *Pick.* 135. *Wells vs. Fish*, 3 *Ib.* 74. *Farnam vs. Brook*, 9 *Pick.* 212. *South Sea Company vs. Mymondsile*, 3 *P. Wms.* 143. *Hanley vs. Cramer*, 4 *Cowen's N. Y. R.* 718, (in *Equity*.) *Angell on Limitations*, 188, 196, '7, '8, '9 to 202. *Kane vs. Bloodgood*, 7 *Johns. Ch.* 90, 114. *Trip, Slade and others vs. Low, administrator et al.* 2 *Kelly*, 304. 3 *Blac.* 431. 1 *Story's Eq.* 191, 199, 202, 207 and note to 238. *Prescott & Eason vs. Hubbel, Timmons et al.* 1 *Hill, S. C.* 270. *Hilton vs. Banon*, 1 *Ves. Jr.* 284. *Ryan vs. Mackmath*, 3 *Brown's Ch. R.* 15, 16. *Mr. Bell's note and Pierce vs. Nibb*, there cited p. 16, note. *Jarris vs. White*, 7 *Ves.* 413, '14. *Gray vs. Mathias*, 5 *Ves.* 293, '94. *Bromly vs. Holland*, 5 *Ves.* 618, '19. *Piersoll vs. Elliott*, 6 *Peters' R.* 95, 98. 1 *Johns. Ch. R.* 517. 1 *Story's Eq.* 309, 307, 308. *Adams vs. Barrett*, 5 *Ga. R.* 413. *Howell, administrator, vs. Fountain et al.* 3 *Kelly*, 176. *Whitehead vs. Peck*, 1 *Kelly*, 153. 3 *Black.* 432, 163. *Lever vs. Lever*, 1 *Hill's Ch. R. S. C.* 62. *Kane vs. Bloodgood*, 7 *Johns. Ch. Rep.* 110. 2 *Story's Eq.* 1284, 1520, 1521, and notes. *Madd. Ch. Pr.* 98. *Story's Eq. Plea.* 751 to 760. *Stackhouse vs. Barnston*, 10 *Ves.* 466, '67. 15 *Ib. ex parte Dewdney*, 496. *Beckford vs. Wade*, 17 *Ib.* 96. *Murry vs. Coster*, 20 *N. Y. Rep.* 576, 582, and 5 *Johns. Ch. R.* 522. *Prevost vs. Arats*, 6 *Wheat.* 489. *Edmondorf vs. Taylor*, 10 *Ib.* 168. *Nelson vs. Wilkins*, 3 *Peters*, 44, 52. *Pactt vs. Vattier*, 9 *Ib.* 405, 416, 417. *South Sea Company vs. Mymondsile*, 3 *P. Wms.* 143. *Doloraine vs. Browne*, 3 *Bro. C. R.* 633, 646. *Mr. Bell's Note. Delouche vs. Lanties*, 3 *Johns. Ch. Reps.* *Angell on Limitations*, 161, 174. *Farnam vs. Brook*, 9 *Pick.*

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212. *Kane vs. Bloodgood*, 7 Johns. Ch. R. *Sims vs. McDonald*, 3 Kelly. *Thomas vs. Brinsfield*, 7 Ga. Rep. 157, '58. *Lever vs. Lever*, 1 Hill's Ch. R. S. C. 62. *Barnwell vs. Barnwell*, 2 Ib. 252. *Fonb. b. 1, chap. 4, §27, and note p. 287. Purcell vs. McNamara*, 14 Ves. 91. 8 Porter's Ala. Rep. *Houssal vs. Gibbs*, 1 Bail. Eq. S. C. R. 482. *Wardlaw vs. Gray*, *Dudley's Ga. Rep.* 85. *Taylor vs. Bates*, 6 Cov. N. Y. 376. *Strafford vs. Richardson*, 15 Wend. *Ferris vs. Parris*, 10 Johns. 288.

LYON, for defendant, cited—

1 *Bailey's Rep.* 230. 2 *Atk.* 612. *Cooper's Eq. Pl.* 11. 2 *Story's Eq. Jar. note to §495. Jeremy's Eq.* 184, 396. *Lady Ormond vs. Hutchinson*, 13 Ves. 47. *Purcell vs. McNamara*, 14 Ves. 91. *Wood vs. Downs*, 18 Ves. 120. *Hovenden vs. Annely*, 2 Sch. & Lef. 634. *Freeman's Ch. Rep.* 156, 300. *Murray vs. Maan*, 8 Porter's Rep. 222. 1 *Hill's S. C. Rep.* 67.

By the Court.—WARNER, J. delivering the opinion.

Two questions were made on the argument of this cause, by the plaintiff in error—

First—whether the allegations in the complainant's bill are sufficient to give to a Court of Equity jurisdiction of the cause?

Second—whether the complainant's right to call the defendant to account with her, concerning the money and property placed in his hands, and entrusted to his management, for her benefit, is not, according to the allegations made in her bill, barred by the Statute of Limitations?

[1.] In regard to the first objection, we are of the opinion the complainant has made, upon the record, a clear case for the jurisdiction of a Court of Equity. The bill charges, that the complainant placed a large amount of money and other property in the hands of the defendant, in the trust and confidence that he would so use it, and invest it for her benefit, as, in his discretion, should be most conducive to her interest; that he accepted the money and property, so placed in his hands and entrusted to him for the purposes stated, and has made large profits therefrom, by investing the money so placed in his hands, by the complainant, as well as the money arising from the proceeds of the property

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so turned over to him, in lands, negroes, negotiable securities and other property; that the particular numbers of the land, so purchased by defendant with the funds of the complainant, as well as the names and number of the negroes, the names of the obligors of the notes, bonds and specialties, and the respective amounts thereof; the defendant has *fraudulently* and in bad faith, withheld from the complainant, and *concealed* the same under his own name.

The plaintiff in error insists, that it is not alleged in the bill, that it is necessary to search the conscience of the defendant for a *discovery*, to enable her to obtain a decree against him. The reply is, that the complainant has made such allegations as make it affirmatively appear, on the face of the bill, that such a discovery is *necessary*. The allegation of such facts, as make it appear that a discovery from the defendant is *necessary* to enable her to obtain a decree, will give to the Court jurisdiction, and is equally as satisfactory as if the allegation, that it *was necessary*, had been inserted without the facts. The very nature and history of this transaction, as disclosed by the record, necessarily gives to a Court of Equity jurisdiction. It has been earnestly insisted before us, that the claim of the complainant is, by her own showing, barred by the Statute of Limitations, and that, if in the view of the Court, the defendant shall be considered as a *trustee* for the complainant, still it is such a trust as against which the Statute of Limitations will run.

There are two general classes of trusts—First, *express* trusts, created by the act of the parties, or by the appointment of the law. Under this head may be included executors and administrators, guardians of infants, bailees, factors, agents, persons who receive money to be paid to another, or to be applied to a particular purpose, and those who fill any *fiduciary* situation, created either by the act of the parties, or by the appointment of the law. Every deposit, says Chancellor Kent, in *Kane vs. Bloodgood*, (7 Johns. Ch. R. 110,) is a *direct* trust.

Second, *implied* trusts, as where persons claiming property in their *own right*, are, by the decree of a Court of Equity, founded on *fraud* or the like, held to be trustees by implication of law.

Many cases have been cited at the bar in relation to the application of the Statute of Limitations to trusts and trustees. Without attempting to reconcile and harmonize the apparent conflict

ing decisions to be found in the books, both in England and in this country, upon this question, we will endeavor to deduce from them the following general propositions:

[2.] First, that in cases of *express* trusts, created either by the act of the parties, or by the appointment of the law, the Statute of Limitations does not begin to run in favor of the trustee, so long as the trust continues, and is acknowledged to be a *continuing, subsisting trust*, for the reason, that the possession of the trustee is the possession of the *cestui que trust*; but when the trust is *denied* by the trustee, and he claims to hold the trust funds or the trust property as his own, *adversely* to his *cestui que trust*, the latter having *knowledge* of that fact, the Statute will begin to run in favor of such express trustee, from the time of such *adverse* claim or possession. *Kane vs. Bloodgood*, 7 *Johns. Ch. R.* 123. *Boone vs. Chiles*, 10 *Peters' Rep.* 223. *Willison vs. Watkins*, 3 *Peters*, 52. *Houssal vs. Gibbs*, 1 *Bailey's Eq. R.* 485. *Baker vs. Whiting*, 3 *Sumner's Circuit Court Rep.* 466.

[3.] Second, in cases of *implied* trusts, where the party claims title to the property in his *own right*, and is sought to be converted into a trustee by operation of law, the statute begins to run in his favor from the time of his *possession*, in the same manner as it would do in a Court of Law, for the reason, that *his* possession never was the possession of the alleged *cestui que trust*, inasmuch as the relation of trustee and *cestui que trust* never, in *fact*, exists between them, until the decree of the Court, establishing that relation; until that time, the alleged trustee held, and claimed, in his *own right*. *Boone vs. Chiles*, before cited, 223. *Edwards vs. University*, 1 *Dev. & Batt. Eq. Rep.* 326, 7. When the cases to be found in the books, assert the principle that the Statute of Limitations does not run against an *express trust*, it must be understood, that the Statute does not run, so long as the trust continues, as an *acknowledged subsisting trust*; but it must also be understood with the qualification, that if the trustee *disavows* the trust, and claims the trust funds, or the trust property, in his *own right*, *adversely* to his *cestui que trust*, with the *knowledge* of the latter, the Statute will begin to run from the time of such *adverse* claim and possession; otherwise, the Statute of Limitations would fail to accomplish one great object of its enactment.

Then let us apply the facts of the case before us, to the fore-

going principles, which we have asserted for its control and government.

The complainant deposited in the hands of the defendant a large amount of money and property, to be used, managed and invested for her benefit, in the *trust* and *confidence* that he would so use, manage, and invest it, as would be most conducive to her interest, and that he would account to her for the same, and the profits arising therefrom, whenever requested by her to do so. The defendant accepted the trust, by receiving the money and property, for the purposes designated, and has made large profits from the same. Independent of the alleged settlement, which we shall hereafter notice, it appears that the trust continued as a *subsisting trust* in the hands of the defendant, from the time he accepted it, until the first of May, 1849, when her agent called on him for an account, which he refused, and denied that he had any of her property or effects in his hands. The Statute of Limitations, then, did not begin to run in favor of the defendant, according to the allegations made in the bill, until May, 1849, unless the alleged settlement stated therein constitutes a starting point for the operation of the Statute. The plaintiff in error contends, that the Statute commenced running from the time of the alleged settlement. Was that settlement made, or pretended to have been made, in relation to the *money* and *property* originally deposited in the hands of the defendant by the complainant, or was it made in relation to the *lands* mentioned in the deed executed to the complainant by the defendant, to avoid the effect of the anticipated recovery in the *crim. con.* suit against the defendant? After stating that the defendant had erased from the deed all the numbers of the lots of land of any value, the complainant alleges that the defendant, in the month of November, 1844, called on her, and said "he wanted to settle with her *in relation to said lands.*" The complainant admits she signed a receipt prepared for her by the defendant, for the purpose of discharging himself from further liability, *on account of said lands, to her.* What lands? The lands mentioned in the deed executed by the defendant to the complainant, on the 12th day of September, 1839, for the purpose stated in her bill, and under which, she claims no interest in this suit. That the settlement was had in relation to the lands mentioned in *that deed*, and which had been erased by the defendant, is the more apparent, by reference to the receipt

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itself, which is attached as an exhibit, and found on the back of that identical deed. The receipt is in the following words:

"GEORGIA—BAKER COUNTY.

"This is to certify, that the within numbers in this deed, that is marked out, has been sold by B. O. Keaton for me, and the proceeds turned over to me by him, the said B. O. Keaton, this, the 2d day of November, 1844.

"E. M. M. GREENWOOD.

"Tests: JAMES JEFFRIES."

From the allegations in the bill, as well as from the receipt itself on the back of the deed, we are clearly of the opinion, that the alleged settlement had reference to the lands mentioned in that deed, and not to the money and property which had been turned over to the defendant, in trust, for the benefit of the complainant.

It is, however, insisted, that at the time of this alleged settlement, the defendant gave to the complainant a note on Deunard for \$180 00, and said that was "*all he had in his hands of complainant's.*"

The argument is, that this was a denial of the defendant, that he owed the complainant any thing on account of the trust property in his hands; that it was a disavowal of the trust on his part, and was notice to her that he was claiming the trust property as his own, adverse to her title, and therefore, the statute commenced running in his favor, against her, from that time. The reply is, that the settlement was made in relation to the lands mentioned in the deed; and when the defendant said that the \$180 00 was all he had in his hands of complainant's, he must be understood to have spoken in reference to the subject matter of the settlement—that the \$180 00 was all he had in his hands belonging to the complainant, on account of the lands which he had sold, and craved from the deed, on the back of which, the receipt was entered, and not that the \$180 00 was all that he had in his hands of complainant's, on account of the trust property. If the settlement had been made in reference to the trust property, and the defendant had openly stated that the \$180 00 was all he had in his hands of that property, it might have been such a denial of the trust, which an adverse claim on his part to the trust

property—as would have authorized the application of the Statute. For, then, the complainant would have been *notified* that he claimed, in his *own right*, the *trust funds* in his hands, as against her, and refused to account for them. The evidence, however, of such *adverse* claim, on the part of the trustee, ought, in all cases, to be clear and satisfactory, to authorize the running of the Statute of Limitation against an express trust. But it is sufficient for the present, to say, that in our judgment, according to the case made by the complainant, the alleged settlement had no reference to the *trust property*, but only to the *lands* erased from the deed; and the declarations of the defendant at that time, must be considered as having had reference thereto.

Let the judgment of the Court below be affirmed.

NO. 17.—JOHN CALDWELL, plaintiff in error, vs. SEABORN MONTGOMERY and wife, defendants in error.

- [1.] If the lapse of the period of limitation appear with certainty on the face of a bill, and there is nothing stated to avoid it, the objection may be taken by demurrer.
- [2.] A bill filed for the recovery of damages, for the breach of a bond for title, is a demand founded on a sealed instrument, and such a claim is not barred until twenty years after the accrual of the right of action thereon.
- [3.] A creditor may, in Equity, follow the assets of his debtor into the hands of a distributee, whether real or personal; and the Statute of Limitations will not give to the distributee a title to the property, which will defeat the creditor's claim. But the creditor must sue upon his claim, within the statutory term applicable to it; if he does not, he will be barred, unless there is a reply to the Statute, which will prevent its operation.

In Equity, in Sumter Superior Court. Decision on demurrer, by Judge WARREN, November Term, 1849.

The bill, in this cause, filed by John Caldwell, 16th April, 1849, charged, that on 7th May, 1837, one Thomas S. Tondoe,

then of Walker County, sold to Caldwell a tract of land lying in Walker County, for \$400, and gave a bond for titles—binding himself, his heirs, executors, &c. to make good warranty titles to the land by 1st December, 1837; that about the 5th December, 1837, Tondee, fraudulently professing to act as attorney for one John L. Grayson, an infant, made a deed to the land, having no written authority so to do; that in 18— Tondee died, without ever having paid the money stipulated in the bond, or made the titles to the land, as he was bound to do; that his widow, Julia Tondee, his only heir, became administratrix on the estate, and after paying other debts, turned over to herself, as sole distributee, the balance of the estate, and obtained letters of dismission.

The bill further charged, that in 1838, John L. Grayson having arrived at age, disaffirmed the unauthorized agency of Tondee, and executed a deed to his interest in the tract of land, to one John G. Blanc, for \$200, and "said Blanc, on 1st January, 1845, made a deed to complainant."

The bill further charged, that the widow, Julia Tondee, subsequently intermarried with Seaborn Montgomery, and as a reason for the delay in instituting the suit, that complainant lived in Walker, and Tondee had removed to Sumter, and that complainant had heard that the estate of Tondee was insolvent, and that he was ignorant, until recently, of the residence of his widow.

The prayer was for a decree for two hundred dollars, with interest from the date of the contract, and for general relief.

To this bill, a demurrer was filed, on the grounds—

1st. That the bill did not make a proper case for the interposition of a Court of Equity.

2d. That the complainant was barred by the lapse of time and his own laches.

The Court sustained the demurrer, and this decision is assigned for error.

E. R. Brown, for plaintiff in error, cited—

Miller vs. McIntyre, 6 Pet. R. 61. *Graig vs. Summerville*, 4 Cond. E. Ch. Rep. 453. *Gillespie vs. Alexander*, 3 Ib. 326. *David vs. Tread*, 7 B. & C. *Agnes vs. Wilson*, 1 Doug. 385. *Waters*

vs. Ogden, 1b. 452. *Alder vs. Chip*; 2 *Burr*. 756. *Chalmley vs. Paxton*, 3 *Bingh.* 1.

B. HALL, (representing *King*.) for defendant, cited—

2 *Greenl. Ev.* §357. 4 *Kent*, 404, and references. *Story's Eq. Pl.* §§484, 814. *Trip v. Albrid*, 1 *Hill Ch. Rep.* 145. *Aikin vs. Hill adm'r.* 7 *Ga. Rep.* 573.

By the Court.—NISBET, J. delivering the opinion.

Two questions were made upon this bill, before Judge Warren, in the Court below, by demurrer—

1. Whether the complainant was not barred by the Statute of Limitations; and

2. Whether there is equity in the case made.

The Court below held that there is no equity in the bill, and that the complainant is barred by lapse of time.

[1.] Upon the argument before us, some question was made, as to the right of a defendant in Equity, to avail himself of the Statute of Limitations, upon demurrer. It is proper, therefore, briefly to notice that question. Courts of Equity act upon the analogy of the law as to the Statute of Limitations; and will not entertain a suit for relief, if it would be barred at Law. Although it may be conceded—for it is true—that the Statute does not, in terms, apply to Courts of Equity, yet the principles upon which it is a bar, apply equally to parties in Equity, and parties at Law. It may be therefore stated to be well settled, that in all cases, where, at Law, the Statute would be a bar, it is the law of the Courts of Chancery. This being conceded, the question is, *now* is the Statute available in Equity? Is it available on demurrer, or must it be pleaded? *Lord Redesdale*, in his text, says that *length of time* has been considered as no defence, though apparent on the face of the bill, without any circumstance stated to avoid it by demurrer; and there is but little doubt, but that up to the time of his writing his treatise, it had been generally so held. He, himself, however, held differently afterwards, in *Horenden vs. Annesly*, 2 *Sch. & Lefr.* 636 to 638. It is now well settled, that if the lapse of the period of limitation appear with certainty on the bill, and there is nothing stated to avoid it, the objection

may be taken by demurrer. *Story's Eq. Plead.* §§484, 503, 751, and notes. *Foster vs. Hodgson*, 19 Vesey, 179. *Hoan vs. Peck*, 6 Sim. R. 51. *Mitf. Eq. Plead. by Jeremy*, 212, note c. *Starkhouse vs. Barnstow*, 10 Vesey, 466 to 470. *Aggas vs. Pickercell*, 1 Atk. 225. *Hardy vs. Reen*, 4 Vesey, 470. *Deloraine vs. Browne*, 3 Bro. Ch. R. 633, and notes. *Wisner vs. Barnett*, 4 Wash. C. C. R. 631. See also 3 M. & C. 499. *Young & Coll.* 266. 7 Paige, 195, and lb. 373. 5 Johns. Ch. R. 521. 5 Madd. 328.

To a just consideration of the question of the Statute of Limitations; it is necessary to determine what is the character of the demand sought to be enforced by this bill. It is founded on the breach of a bond for-titles, conditioned that warranty title shall be executed by the obligor to the complainant, at a specified time, to a tract of land. The bill avers a breach; that the obligor died intestate; that his widow administered on his estate, paid the debts, delivered to herself and appropriated as sole heir and distributee, the effects of the estate, and was dismissed by the Ordinary; and that she intermarried with Montgomery, who, with her, is a party defendant. The prayer is for discovery, and a decree that the defendants pay two hundred dollars, with interest, from the maturity of the bond, as damage sustained by its breach. It is, in short, a bill to follow and apply the estate of a decedent, in the hands of a distributee, to the payment of a debt due, as damages for the breach of a bond. We hold it a debt due by bond, and not, as argued, a demand due upon open account. It is a specialty debt, and would rank as such in the payment of debts by an administrator. And to this point, see *Davis and others vs. Smith and others*, 5 Geo. Rep. 298.

[2.] If it be a bond debt, the term of limitation is twenty years. Here, the term which has elapsed from the breach of the bond, (and that is the time when the right of action accrued,) to the suing out this bill, is something more than ten years. The plaintiff would not be barred at Law, in an action on this bond; nor is he here, in Chancery. His right of action had nearly ten years to run. We do not believe that the doctrine of stale demands applies to a claim not barred at Law, by half the statutory term. It does not, therefore, apply to this case.

[3.] The argument of the learned counsel is, that the title of the defendants to the property received from the estate of their ancestor, and the debtor in this case, is protected by the Statute

of Limitations. He says that, inasmuch as they have held possession, as distributees, of the land, for seven years, and of the personalty for four, that they have a statutory title, and therefore neither can be applied to the payment of this debt. The Statute of Limitations does not apply to this case, in that view of it, at all. The complainant is not setting up a title to the property; the suit is not for property. It is brought to recover a debt due by the ancestor of the defendants—a debt which, in Equity, will follow the estate of the debtor into whatever hands it may fall. By the averments in the bill, the estate, both real and personal, of the debtor, has gone into the hands of the defendant, by regular descent. Equity will lay hold of it, and appropriate it in payment. For, whilst debts are unpaid; there is nothing to distribute. The law makes a man just, before he can be generous; and when property is distributed, and debts remain unpaid, the distributee holds it, in character of trustee, for the creditor. As well might the debtor, in life, set up a title to his property by the Statute of Limitations, against the enforcement of his own debt, as his distributee. The Statute, however, will run in bar of the creditor's demand, in favor of the distributee, just as it would in favor of the original debtor, were he in life and sued. The plaintiff in this suit, as in others, must sue within time, at his peril. If, for example, this suit were after twenty years, (the term which bars bonds,) and the Statute pleaded, the complainant would fail, unless something could be replied, which would prevent the operation of the Statute. It is within time, and the Statute cannot avail the defendants.

We have no doubt about the equity of this bill. There is no question but that a creditor may pursue the assets of his debtor, in the hands of a legatee, distributee or purchaser from them. Questions of some nicety often arise in these cases, as to who shall be made parties—as to the liability, *first*, of the personalty, as to contribution, &c. &c.—none of which, happily, can be made in this case. The estate is charged to be ample for the payment of the debt—there are no other debts to pay—the defendant, Mrs. Montgomery, was the administratrix, and also, the *sole* distributee. All the estate went into her hands, first, as administratrix; and then as distributee. Having intermarried, her husband is also made a party. There is, therefore, nothing to hinder, in any view of it, a Court of Chancery from making a decree which

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will do complete justice. *Hodges vs. Waddington*, 2 Ventr. 360. *Noel vs. Robinson*, 1 Vern. 94, S. C. *Newman vs. Barton*, 2 Vern. 205. *Gillespie vs. Alexander*, 3 Russ. Ch. Cases, 136, '7. 2 *Williams' Exr's*, 1041, 970, 971. *Tripp vs. Talbrid*, 1 Hill's Ch. R. S. C. 142. 1 Vern. 162. *Corbet et al. vs. Johnson's Heirs*, 1 *Brockenborough*, 77.

Let the judgment be reversed.

No. 18.—JARED TOMLINSON, plaintiff in error, vs. JAMES R. COX, defendant.

- [1.] In all applications for a new trial in the Superior Courts, a brief of the testimony in the cause must be filed by the party applying for such new trial, under the revision and approval of the Court, at the term of the Court at which the application is made, in conformity to the 61st Common Law Rule of Practice, and the fact must be evidenced in writing.
- [2.] A brief of the testimony which refers to executions, judgments and interrogatories, as being attached, when in fact no such papers are appended, is fatally defective; and the omission cannot be supplied by the certificate of the presiding Judge, that he recognizes such documents as in Court before him, on the final hearing of the motion.
- [3.] The best mode of making out the brief of the testimony, is to embody in it an abridged statement of the oral, and a copy of the written evidence.

Motion for new trial, in Sumter Superior Court. Decided by Judge WARREN, at November Term, 1849.

When this motion came on to be heard, the claimant moved to dismiss the rule, on the ground that no brief of the testimony in this case was agreed on by counsel, and no approval of the Court was entered on the minutes of the Court, as was required by the 61st Rule of Court, and there was not any written evidence that a brief of the evidence had been filed with the Clerk.

The Court overruled the motion, and ordered a brief of the evidence to be entered, *nunc pro tunc*, which the Court alleged

be remembered to have approved at the last term, and directed to be entered on the minutes. To this decision complainant's counsel excepted.

Claimant farther objected, that the brief of testimony was not sufficiently full and complete; in this, that it referred to testimony of witnesses examined by commission, as the interrogatories of A and B, without giving an abstract of their contents; and, also, in referring to judgments and *fi. fas.* as appended thereto, without giving any abstract of them, and when, in fact, they were not appended.

The Court overruled the objection and claimant excepted. Other exceptions were filed, not necessary to be stated.

B. HILL, for plaintiff in error.

H. MORGAN, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] In *Graddy vs. Hightower*, (1 Kelly's R. 255,) this Court held, "That nothing short of a brief of the testimony, approved by the Court, and such approval entered on the minutes, or agreed upon by the parties or their counsel, and such agreement entered on the minutes, at the term at which the rule for a new trial is applied for, will be a compliance with the 61st Rule of Court. This rule requires, that "*A brief of the testimony in the cause shall be filed by the party applying for such new trial, under the revision and approval of the Court.*" *Hotchkiss*, 951. In *Petty and others vs. Mahaffy*, (3 Kelly, 217,) and *Hartridge vs. Weston*, (4 Kelly, 101,) the same construction was given to this rule.

[2.] Now, it is not pretended that there was any written evidence of any agreement of counsel as to the brief of the testimony in this case, filed at the term when the motion was made for a new trial, or written approval thereof by the Court. Had this been done, and the Clerk neglected to place it upon the minutes, it might have been entered, *nunc pro tunc*, at the ensuing term. As it is, the objection is fatal.

The brief itself, in the judgment of this Court, is fatally defective. It refers to *fi. fas.* judgments and interrogatories, as being

attached, when, in fact, none such were appended. It is true, that the presiding Judge certifies, that upon the final hearing of the motion, "he recognized these papers as in Court before him." But this does not cure the defect. It will not do to confide such matters even to the memory of the Court. Besides, it is the right of the opposite party to have a *perfect* brief *filed*, subject to his inspection, in the interim, in order that he may prepare for the argument.

[3.] We have been requested to suggest, what is the proper mode of making out the *brief* required by the rule. Perhaps the best plan would be, to embody in it a short or abridged statement of the oral, and a copy of the written testimony. We will not say, nor are we to be understood as deciding, that it will not do to annex the original documents; but these are often the private papers of the party introducing them, and subject to be withdrawn from the office; and inasmuch as this brief becomes a part of the record, it should be preserved in some permanent form.

In *Spears vs. Smith*, (7 Ga. R. 436,) we held, that it was not necessary that the brief should be entered on the minutes, as was ordered to be done in this case, but that it need be *filed* only.

Let the judgment of the Court below be reversed.

No. 19.—LARKIN GRIFFIN, plaintiff in error, vs. JAMES M. B. WITHERSPOON, defendant.

[1.] Where the Jury found a verdict for a greater amount of damages than was claimed in the plaintiff's declaration, and a motion for a new trial having been made on that ground, the plaintiff entered a remittiter on the record for the excess: *Held*, that the plaintiff had the right to enter such remittiter, and that a new trial on that ground ought to have been refused.

Case for deceit, in Sumter Superior Court. Tried before Judge WARREN, November Term, 1849.

Bethune vs. McCrary.

This was an action for deceit, with damages laid at \$1000. The Jury found a verdict for the plaintiff for \$1000, with interest from 20th October, 1841. Defendant moved for a new trial, on the ground that the verdict was illegal as to the interest. The plaintiff entered a remittiter for the interest. The Court, notwithstanding, granted a new trial on this ground, and plaintiff excepted.

E. R. BROWN, for plaintiff in error.

By the Court.—WARNER, J. delivering the opinion.

[1.] The ground taken in the Court below for a new trial was, that the Jury had found a verdict for a greater amount of damages than the plaintiff had alleged in his declaration; whereupon, the plaintiff entered upon the record a remittiter for all the damages found by the Jury, over and above the amount claimed in the declaration. We think the plaintiff had the right to remit the excessive damages found by the Jury, and as that was the only ground taken for a new trial, the motion ought to have been refused. We do not readily perceive the reason or the policy which requires a party to litigate, when he is willing to surrender to his adversary all that he claims. See *Tidd's Practice*, 806.

Let the judgment of the Court below be reversed.

NO. 20.—JAMES N. BETHUNE, plaintiff in error, vs. JOHN T. MCCRARY, defendant.

[1.] Where the value of depreciated bills, at a particular time, is to be proven, the proof should apply, with reasonable certainty, to that time, and sayings of persons, as to the value of the bills, cannot be admitted to prove their value.

[2.] It is error to instruct the Jury as to the law arising from facts which are not proven, and about which there is no evidence.

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[3.] The purchaser of a note after due, from an indorser who has paid it, cannot recover upon the note out of a prior indorser, any more than his vendor paid upon it.

Assumpsit, &c. in Sumter Superior Court. Tried before Judge WARREN, November Term, 1849.

Suit was commenced by Bethune against McCrary, as indorser on a note for \$2000, made by John W. Cowart, and payable to the order of M. H. Brown, and indorsed by Brown, John McCrary and Isaac McCrary.

The defendant on the trial proved, that Cowart and Shotwell & Tift, in 1838, bought a steamboat for \$12,000. Cowart gave his notes for \$6000, and Shotwell & Tift gave their notes for \$6000—and all mutually indorsed ~~each~~ others' notes. Subsequently, the Phoenix Bank of Columbus, as the holder of the note now sued on, brought suit against Tift as indorser, who paid off the same in bills of the Phoenix Bank, which were then valued at from 20 to 25 cents in the dollar. Tift then erased the indorsement of Shotwell & Tift, and sold the note to Bethune, without recourse.

Defendant then proved by John S. Haines, that *about the time* Tift paid off this note, he sent some bills on the Phoenix Bank to an agent in Columbus, who returned them to him as worthless. Also, by Geo. M. Dudley, that in 1844, he showed some of the bills to Robert Poe, who said they were worthless; and, farther, that the bills were valueless in Americus, (the County site of Sumter County.) To this testimony plaintiff objected, as irrelevant and in part hearsay. The objection being overruled; plaintiff excepted.

The Court charged the Jury, that if they believed that Shotwell & Tift received the consideration of the note with Cowart, and indorsed it without a special understanding that they were indorsers merely, they were to be considered as joint makers, and on payment by them, the note was discharged, and there could be no recovery of the prior indorsers. To this charge plaintiff excepted.

The Court farther charged, that Tift and his assignee could recover no more of the prior indorsers than the amount he paid, whether it be in current or uncurrent funds.

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To this charge plaintiff excepted, and upon these several exceptions error was assigned.

E. R. BROWN, for plaintiff in error, cited—

Stubbs vs. Goodall, 4 Ga. Rep. 106. *Collins vs. Everett*, *Ib.* 266. *Winn, Shannon & Co. vs. Cox*, 5 Ga. Rep. 373. *Byles on Bills*, 97. *Chitty on Bills*, 147. *Kirksey vs. Bates*, 1 Ala. 311.

B. HILL, for defendant, cited—

Story on Bills, §§422, 432. 2 *Greenlf. Ev.* 145. *Bank of St. Marys vs. Mumford & Tyson*, 6 Ga. Rep. 45.

By the Court.—NISBET, J. delivering the opinion.

[1.] We are satisfied that the Court erred in admitting the evidence of Mr. Dudley and Mr. Haines. The fact to be proven was, the value of the bills of the Phoenix Bank, at the time that the plaintiff's vendor, Tift, paid the note, as indorser. Mr. Haines was permitted to testify to statements made by an agent, whom he had sent to Columbus with bills of that bank, as to their value there. This agent was a competent witness and might have been produced. Haines' proof of his statements was hearsay evidence. The same may be said of Mr. Dudley's evidence. He was permitted to testify as to the statements of Mr. Poe, about the value of these bills in Augusta. That evidence was hearsay. Mr. Poe was a competent witness and ought to have been produced. There is nothing in this case which takes the testimony of these two witnesses out of the general rule, that hearsay is not evidence. It does not fall within any of the exceptions to that rule. The value of bills, at a particular time, is a fact susceptible of proof, as any other fact. It may be shown by proving that they were not, at the time, redeemable at the bank which issued them; that they were not receivable at all in payment; or, if at all, at a discount, and what discount; or by proof of their actual sale to brokers or others in the community; and it was incumbent on the party to produce witnesses who, of their own knowledge, could swear to these facts, or others of like character.

Besides, so far as these witnesses prove, of their own knowledge, the value of these bills, they are not sufficiently explicit as to the time. The thing to be proven was, the value of the bills at a particular time, to wit: the time when Tift paid off the note. Now, considering the fluctuations in the value of bank paper—which to-day may pass current *at par*, and to-morrow may be at a heavy discount—we hold it proper, that the proof should be confined, with reasonable certainty, to the time at which their value, by the exigencies of the cause, is to be ascertained.

[2.] The Court charged the Jury, "that if they believed that Shotwell & Tift received the consideration of the note sued on, with Cowart, (the maker,) and indorsed it without a special understanding that they were indorsers merely, they were to be considered as joint makers, and on payment by them, the note was discharged, and there could be no recovery on the prior indorsers." This charge is excepted to as hypothetical, there being no evidence whatever, that Shotwell & Tift were interested in the consideration. Upon looking carefully into the record, we find no evidence whatever of that fact. The evidence is, that Cowart (the maker of the note sued on) and the firm of Shotwell & Tift bought a steamboat, in 1838, for the sum of \$12,000, Cowart gave his notes (and this is one of them) for \$6000, and Shotwell & Tift gave theirs for \$6000, and Cowart and Shotwell & Tift became mutual indorsers. This is all the evidence in the record, to this point. I do not see how it can be made to prove, that Shotwell & Tift were interested in the consideration of Cowart's notes. It can only show *that*, by showing that Cowart and Shotwell & Tift were purchasers together of the entire boat. A contrary inference, it seems to us, is the only legitimate inference to be drawn from the evidence—that is, that these parties, Cowart and Shotwell & Tift, were each purchasers of a moiety of interest in the boat, which they held severally, and for which they gave their several notes. Indorsing for each other, in this instance, does not any more prove them respectively interested in the consideration of the notes indorsed, than would indorsement prove that fact in any instance of mutual indorsement. The legal inference drawn from the fact of indorment is, that the parties were accommodation indorsers for each other. Believing that there is no evidence upon which such instructions could be predicated, we think the charge was not required by the case—was

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calculated to direct the mind of the Jury to an issue not made, and therefore erroneous. Upon these two grounds the case is remanded.

[2.] *Shutwell & Tift*, who were the last indorsers on this note, being sued, paid it to the *Phoenix Bank* in their own bills, which were at a discount, and sold it to the plaintiff, erasing their names. The plaintiff brought suit on the note against the defendant, a prior indorser. The Court instructed the Jury, that the plaintiff could recover only what *Tift* paid upon it, and this instruction is excepted to. The plaintiff is the purchaser of this note, after its maturity, and indeed, as we infer from the testimony, with actual notice of the amount which his vendor had paid on it. Under these circumstances, he can recover no more out of a prior indorser, than *Tift* himself could recover. He took the note, subject to all the equities subsisting upon the note transaction between the original parties—he took it, subject to the equities subsisting between his vendor and the prior indorsers to him. He could not recover out of them any more than he had paid, neither can his assignee. *Story on Bills*, §187. 2 *Greenl. Ev.* §177, 79. *Chitty on Contracts*, 773. *Chitty on Bills*, 76 to 79, 9th ed. *Bailey on Bills*, 2d ed. 534, notes. *Smith's Com. Law*, 222. 3 *M. & S.* 95. 4 *Bing.* 390. 3 *B. & Ad.* 316. *Chitty on Bills*, 536.

Let the judgment be reversed.

No. 21.—*JAMES N. BETHUNE*, trustee, &c. plaintiff in error, vs. *FRANCIS G. WILKINS* and *ADOLPHUS S. RUTHERFORD*, Sheriff, &c. defendants.

[1.] An injunction will not be granted to restrain a mere trespass, susceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law. To authorize a Court of Equity to interfere in cases of trespass, there must be something particu-

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calculated to direct the mind of the Jury to an issue not made, and, therefore, erroneous. Upon these two grounds the cause is remanded.

[3.] Shotwell & Tift, who were the last indorsers on this note, being sued, paid it to the Phoenix Bank in their own bills, which were at a discount, and sold it to the plaintiff, erasing their names. The plaintiff brought suit on the note against the defendant, a prior indorser. The Court instructed the Jury, that the plaintiff could recover only what Tift paid upon it, and this instruction is excepted to. The plaintiff is the purchaser of this note, after its maturity, and indeed, as we infer from the testimony, with actual notice of the amount which his vendor had paid on it. Under these circumstances, he can recover no more out of a prior indorser, than Tift himself could recover. He took the note, subject to all the equities subsisting upon the note transaction between the original parties—he took it, subject to the equities subsisting between his vendor and the prior indorsers to him. He could not recover out of them any more than he had paid, neither can his assignee. *Story on Bills*, §187. 2 *Greenl. Ev.* §§177, '79. *Chitty on Contracts*, 773. *Chitty on Bills*, 76 to 79, 9th ed. *Bailey on Bills*, 2d edit. 534, notes. *Smith's Com. Law*, 222. 3 *M. & S.* 95. 4 *Bing.* 390. 3 *B. & Ad.* 316. *Chitty on Bills*, 536.

Let the judgment be reversed.

No. 21.—JAMES N. BETHUNE, trustee, &c. plaintiff in error, vs. FRANCIS G. WILKINS and ADOLPHUS S. RUTHERFORD, Sheriff, &c. defendants.

[1.] An injunction will not be granted to restrain a mere trespass, susceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law. To authorize a Court of Equity to interfere in cases of trespass, there must be something particu-

lar or special in the case, for which a Court of Law cannot afford adequate redress.

[2.] An allegation in the bill, that the tenant will be rendered homeless, for want of means to procure another habitation, will not authorize a Court of Equity to restrain the officer, by injunction, from placing the purchaser at Sheriff's sale in possession of the premises. The Act of 1823, which authorizes the Sheriff to place the purchaser of real estate in possession, does not justify the officer in dispossessing any other person but the *defendant in execution, his heirs or tenants*.

In Equity, in Muscogee Superior Court. Decision by Judge ALEXANDER, at Chambers, October, 1849.

James N. Bethune, as trustee of Mrs. Parizade Mitchell and her children, filed a bill, alleging that on 1st January, 1846, James S. Norman purchased a certain lot of land in Wynnton, of John Banks, for \$1000, and gave his four promissory notes for the same, taking at the same time from Banks, a bond to make titles when the notes were paid; that subsequently, on 1st September, 1847, the complainant, as trustee, purchased of Norman, the bond of Banks, and caused the same to be transferred to himself, as trustee; that he, as trustee, undertook to pay the notes given by Norman for the purchase money—the whole being still unpaid; that, as trustee, he had paid one of the notes and a part of the second, and that Mrs. Mitchell and her husband, Isaac Mitchell, had been in possession ever since.

The bill further alleged, that in November, 1848, one George Hargraves, Jr. obtained judgment against James S. Norman for \$250, besides interest, and caused the *fi. fa.* issued thereon to be levied on this lot of land; that the same was sold by the Sheriff, and purchased by Col. Seaborn Jones for \$129, who subsequently transferred his bid to Francis G. Wilkins, to whom the Sheriff made a deed; that Wilkins gave the Sheriff a bond to indemnify him for damage or loss, upon which the Sheriff agreed to give him possession of the land; that the Sheriff had threatened to turn Isaac Mitchell and his family out of possession—to avert which, Mitchell, in writing, acknowledged himself to be the tenant of Wilkins.

The bill was to quiet the possession of the *cestui que trusts* of complainant, and prayed for a perpetual injunction against Wilkins, and for general relief.

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The answer of Wilkins admitted, that he had heard of the claim of complainant, before his purchase, but insisted that Isaac Mitchell made the purchase of Norman; that the *fi. fa.* against Norman, under which the land was sold, was founded on a judgment recovered on one of the notes given for the purchase money. The answer farther admitted, that the land was bid off by Col. Jones, and purchased of him by defendant, and that he took an acknowledgment, in writing, from Isaac Mitchell, that he held as tenant of defendant; but defendant insisted that the acknowledgment was written by the complainant himself, and under an agreement with him, that defendant would acknowledge service of an action of ejectment, to be brought by complainant for the land.

On the coming in of the answer; a motion was made to dissolve the injunction, on the ground that the equity in the bill was sworn off. The Court sustained the motion, and complainant excepted.

H. HOLT, for plaintiff in error.

H. L. BENNING, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

This bill was filed to restrain the Sheriff, by injunction, from placing the purchaser of a certain lot in Columbus, at Sheriff's sale, in possession of the premises, on the ground that the complainant is the owner of the property so purchased; and that being neither defendant in execution, his heir or tenant, the Sheriff is not authorized to eject him from the premises.

The defendants having answered the bill, moved the Court below to dissolve the injunction, upon the ground that the equity in the bill had been fully sworn off; which motion was granted, and thereupon the complainant excepted, and now assigns the same for error in this Court.

[1.] We feel bound to affirm the order dissolving the injunction, not, however, because the equity in the bill was sworn off, but because the injunction ought never to have been granted. *Anthony vs. Brooks*, 5 Ga. R. 576. The injury threatened is, at most, a *mere trespass*, susceptible of ample pecuniary compensa-

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tion, and for which the party aggrieved may, and no doubt will, obtain adequate damages in a Court of Law.

[2.] And to that redress the complainant is remitted, should the Sheriff, without authority of law, forcibly dispossess him. There is nothing special in this case, for which a Court of Law could not administer a satisfactory remedy. It is true that the bill alleges, that the tenants—the *cestui que trust* of the complainant—would become homeless and houseless, for want of means to provide another habitation. This, however, would only aggravate the trespass and enhance the measure of damage.

Let the judgment below be affirmed.

No. 22.—JOHN J. SNELLING, plaintiff in error, vs. SIMON PARKER and another, defendants.

[1.] The Act of 1822, which declares that, "In cases where an appeal is entered from the first verdict, the property of the party against whom the verdict is rendered, shall not be bound, except from the signing of the judgment on the appeal, except so far as to prevent the alienation, by the party, of his, ~~land or~~ ^{his} property, between the signing of the first judgment and the signing of the judgment on the appeal," is intended only to prevent the alienation of property by the defendant, pending the appeal, to the injury of the plaintiff; *Held*, that under this Act, two judgments being obtained in favor of two plaintiffs at the same term, against the same defendant, upon one of which only an appeal is entered, and pending that appeal, the defendant alienates his property, which is finally brought to sale, after a judgment on the appeal, the judgment on the appeal is not entitled to share in the distribution of the fund, with the judgment at Common Law, upon which no appeal was entered.

Rule against Sheriff, Talbot Superior Court. Decided by Judge ALEXANDER, September Adjourned Term, 1849.

The only question in this case, arose upon the following agreed statement of facts:

Snelling vs. Parker and another.

At the December Term of the Inferior Court of Talbot County, 1842, John S. Buckner and John J. Snelling, each obtained a judgment against Charles Evans. An appeal was entered from the judgment in favor of Snelling—which appeal was determined at March Term, 1846, and a judgment entered in favor of Snelling. It was farther agreed, that the money in the hands of the Sheriff, was raised out of property aliened and sold by Evans, after the first judgment, and before the judgment on the appeal. Buckner and Snelling both claimed the amount in the Sheriff's hands.

The Court ordered the whole amount to be paid to Buckner, and Snelling excepted.

L. B. SMITH, for plaintiff in error, cited—

Harden vs. Stovall, Simmons & Co. 1 Kelly, 95.

WORRELL, for defendant,

The Court not being unanimous in their decision, pronounced their opinions *seriatim*.

NISBET, J. delivering the opinion of the Court.

[1.] Two judgments were obtained by two different plaintiffs against the same defendant, at Common Law; upon one of them an appeal was entered, upon the other no appeal was entered. Intervening the date of the judgment at Common Law, and the judgment rendered on the appeal, in the appeal case, the defendant aliened his property. After the judgment on the appeal, his property was levied upon and sold. The money arising from the sale, being in the hands of the Court for distribution, the plaintiff in the judgment on the appeal claimed to be let in upon equal footing with the judgment at Common Law, from which there had been no appeal—that judgment contesting, denied the right of the appeal judgment to be so let in—claiming the whole fund upon its own prior and better lien. The Court below ordered the whole fund to be paid to the Common Law judgment. The

plaintiff in the appeal judgment excepted, and that order is for the review of this Court.

The judgment of this Court is, that the Circuit Court administered the law correctly. By Statute, all judgments take lien from the term at which they are rendered. This is the general rule. By this rule, how stand these two judgments, when both were rendered at Common Law? Both stood upon the same platform—both acquired a lien—and the liens were equal; and had no appeal been entered upon either, they would have equally bound all the property of the defendant, and would have been entitled to share in the distribution of this fund. But one is appealed from and the other is not. How, then, stands the case? Why, the judgment upon which there is no appeal, stands unaffected by the appeal entered on the other. Its lien is perfect still. It binds all the property of the defendant, whether it shall be aliened or not. It is bound to share with no judgment at the time of its date, not rendered.

But the effect of the appeal on the other judgment is, to prevent the lien which it held before the appeal. The appeal opens the whole case—it renews the litigation before the appellate tribunal. When it reaches that tribunal, the case is before it in its totality. When an appeal is entered, there is no judgment. Whether there ever will be a judgment or not in the case for the plaintiff, depends upon the event of the trial on the appeal. If the trial results in favor of the plaintiff, then, and not till then, is there any lien created for him, except *in one single instance and for one single purpose*. These exceptions are created by the Act of 1822. That Act not only creates the exceptions which I will state, but it declares all the principles in relation to these two judgments, which I have before stated. For example, it declares, “that all the property of the party against whom a verdict shall be entered, and a judgment signed thereon, in conformity to the provisions of the 26th section of the Judiciary Act of 1799, shall be bound *from the signing of the first judgment*, in cases where *no appeal is entered*.” That is to say, if an appeal is entered, the first judgment does not bind the property of the defendant, from its signing. Now, this judgment at Common Law, not being appealed from, by this very Act, acquired an unrestricted, unlimited, absolute lien upon all this property, and, of course, the money raised from the sale of it, at the time it was *first signed*. Then

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it had no competitor—now it has none, as we shall see. The full lien which this Statute gave it, when first signed, accompanies it to the time when it seeks its satisfaction before this Court, wholly unimpaired by any thing that I can see. If this Act stopped just here, the inference would be irresistible, that a judgment appealed from, does not bind the property of the defendant from the time of its first signing. But it does not stop here. It declares farther, that in cases where an appeal is entered from the first verdict, the property of the party against whom the verdict is rendered, shall *not be bound, except from the signing of the judgment on the appeal*. Thus declaring all the propositions I have laid down as to the effect of an appeal. But now comes the exceptions to which I just now referred. The Act proceeds, “*except so far as to prevent the alienation* by the party, of his, her or their property, between the signing of the first judgment and the signing of the judgment on the appeal.” By which I understand the Act to say, that the first signing of a judgment which is appealed from, has generally no effect—creates no lien whatever—and that the property of the defendant is not bound until the signing of the judgment on the appeal, *except in one instance*, and that is where the defendant alienates his property; and *except for one purpose*, and that is to prevent such alienation. Words cannot be plainer. The property of the defendant is not bound, by the terms of the Act, except where it is aliened, and to prevent the alienation. Now, because the judgment on the first trial is a judgment for that purpose, it is contended that a lien is created for it on such property as is aliened. This I do not deny; but it is, to my mind, a lien good only against the title of the purchaser. As between him and the plaintiff in that judgment, his title must yield; and when his property is sold, the plaintiff, if not superseded by a better lien, will take the money. The object of the law clearly is, to prevent a fraudulent alienation of property, by defendants, pending an appeal, to the injury of parties plaintiffs. To prevent that, the law gives effect to the first judgment, in case of appeal, and for no other purpose. It gives no effect to it as against other judgments not appealed from. They stand with a perfect prior lien, unaffected by this Act. They are neither benefited nor injured by it. Their lien binds the property at all events. But the construction contended for, would injure them, in all cases where the property aliened is all the property of the

defendant, and is not sufficient, as in this case, to pay both judgments. This construction impairs the lien of judgments, from which there is no appeal—it holds them in abeyance, so far as alienated property is concerned, and compels them to take, *pro rata*, with a judgment perhaps six months, it may be six years, younger. But how is it possible to extend the exception in the Statute beyond its terms? The rule is, that judgments appealed from, do not bind property, except from the signing of the judgment on the appeal. The exception is, that they do bind it for the purpose of preventing alienation. Now, how can this exception be so enlarged as to give effect to judgments appealed from, not only to prevent alienation, but farther, for the purpose of weakening and limiting the liens of other judgments? The idea is plainer thus—the rule is, judgments appealed from, are no judgments but from the signing of the judgment on the appeal. The exception is, they *are judgments to prevent alienation*. How can this exception, in contravention of the rule, make them judgments for another purpose, to wit: for the purpose of holding (in case property is alienated) equal lien with judgments whose lien is older and better by the general Law? By all rules of construction, the exception proves the rule and excludes any other exception. One of the consequences of the construction I am combating, will be to put it in the power of a defendant, when an appeal is entered, by selling his property, to lessen the claim of a subsisting judgment. It gives him the power to let in the claim of the plaintiff on the appeal, even if founded on an open account, equally to participate in a fund raised from alienated property, with a judgment. If that be the true construction, then, in cases like this, the plaintiff on the appeal ought and would desire, that the defendant should sell his property, since, by the sale alone, he gets a claim upon it, equal to the judgment not appealed from; whilst, at the same time, to prevent such sale is the very object which the Act of 1822 has in view. But the construction which we give to the Act, whilst it maintains the dignity of the judgment not appealed from, gives to that Act a specific and highly beneficial effect. That effect is, pending an appeal, to prevent an alienation of his property by the defendant, to the prejudice of the plaintiff's claim.

Let the judgment below be affirmed.

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LUMPKIN, J. concurring—

The preamble to the Act of 1822 sets forth, that “a contrariety of decisions having taken place in the different Courts of this State, as to the time when the property of the party against whom judgment is entered, shall be bound, &c.” *Enacts*, “that from and after the passing of said Act, all property of the party against whom a verdict shall be rendered, and a judgment signed thereon, in conformity to the provisions of the 26th section of the Act of 1799, shall be bound from the signing of the first judgment, *in cases where no appeal is entered*; but in cases where an appeal is entered from the first verdict, the property of the party against whom the verdict is rendered, shall [not] be bound, except from the signing of the judgment on the appeal—except so far as to prevent the alienation, by the party, of his, her, or their property, between the signing of the first judgment and the signing of the judgment on the appeal.” *Prince*, 451.

I have transcribed only so much of this Act as relates to the question to be decided, which is this: Two judgments were obtained at the same Court, from one of which an appeal was entered, and prosecuted to a second and final trial. The defendant in both judgments, between the signing of the first judgment and the signing the judgment on the appeal, alienated a portion of his property, which has been levied on and sold, and the money brought into Court for distribution. Do these judgments take, *pro rata*, or does the judgment which was unappealed from, and which, consequently, is prior in date, have the preference?

If the words of this Statute were doubtful, the preamble would furnish a key to its meaning. It recites that a contrariety of decisions had taken place in the different Circuits of the State, as to the time when the property of the party against whom a judgment is entered, shall be bound. Some of the Courts held, that notwithstanding an appeal was entered, all the property of the defendant was bound from the first judgment; others, that the entry of the appeal vacated the first judgment, unless it was dismissed, when, of course, the first judgment stood affirmed. Now, in view of this controversy, the Legislature declare, that all the property of the party shall be bound, according to the provisions of the 26th section of the Act of 1799, from the signing of the

first judgment, *in cases where no appeal is entered*. But if an appeal is entered, then the property of the defendant *shall not* be bound, except from the signing of the judgment on the appeal—except *so far* as to prevent its alienation.

For myself, I do not feel at liberty to say that *it shall be* bound beyond this.

Besides settling the contrariety of decisions which had sprung up in the Courts *against* the lien of the first judgment, in cases of appeal, the Legislature seem to have had but a single object in view, in passing this Act, and that was, to prevent the alienation, by the defendant, of his property, intermediate the first and second judgment. And the justice and propriety of this was suggested, no doubt, by the fact, that they had already declared, in the previous part of the section, that no lien was created on the property, provided an appeal was entered. They then enact, by way of exception, in the conclusion of the section, that the defendant shall not alienate his property, so as to weaken or defeat the rights of the creditor, or the security on the appeal, in the event of his having the debt to pay; but that both shall be remitted back, if necessary, to the first judgment; that is, the Legislature intended to say, and have said, in so many plain English words, that for the protection of the appeal creditor, and the security on the appeal—a favorite class with all our laws—all the property which the defendant held at the time the first judgment was rendered, shall be retained and held subject to the ultimate recovery in the case; and that if the defendant attempts to dispose of it, it may be followed in the hands of the purchaser, and made liable. Otherwise, the elder judgment, which was unappealed from, finding it more convenient to seek satisfaction out of the property in possession of the debtor, the lien would have been lost to the appeal creditor, upon that which was conveyed away, and his own safety; as well as the indemnity of the security on the appeal, jeopardized.

But, I ask, did the Legislature design to interfere with the relative liens of judgments, as fixed by the Judiciary Act of 1799? To my mind, it is plain that they did not. Indeed, it would seem to me, that they had not left the matter to conjecture; for the Act itself expressly declares, that in cases where an appeal is entered from the first verdict, the property of the party against whom the verdict is rendered, shall not be bound, except from

the signing of the judgment on the appeal. Is it not manifest, therefore, that the Legislature did not intend to disturb the law of lien, as it previously existed; between the judgments themselves?

But, while it is conceded that all this is true, where the defendant makes no attempt to sell his property, yet that fact, under the Statute, fixes the appeal lien from the first verdict. Such, however, is not the language of the Statute. It is true that that event creates a qualified lien, from the date of the first judgment. But for what purpose, and to what extent? I answer, in the terms of the law itself, "*so far as to prevent the alienation by the defendant*," but not so far, I respectfully add, as to interfere with the lien of an older judgment.

And why should it be so? Under this Act, by no shift or device on the part of the debtor himself, or in connection with the other judgment creditors, can he prevent the whole of his property from being made liable for the whole of his debts; and if the proceeds would be rateably distributed among them, according to the seniority of their respective liens, why should alienation, or any other act, done or attempted by the defendant, affect the rights of his creditors? In other words, why should the fact that he has sold his property, place the appeal creditor in a better situation than if he had not sold it? Can there be any good reason assigned, for supposing that the Legislature would have been influenced by any consideration whatever, to place the relative rights of the creditors themselves upon the happening or not of such a contingency?

In cases of attachment, vigilance is rewarded by causing the first served to be first satisfied. But so sacred did the Legislature regard prior liens, that they would not permit even the attaching creditor to assert *his* lien before an older *judgment* creditor. But it is argued, that under the Act of 1822, a lien is given to an appeal judgment, as against not only the purchaser, but all other judgment creditors, not on account of any thing done by the creditors, but by the act of the debtor, in alienating his property, and which, it is admitted; it otherwise would not have had; and that, too, when, perhaps, the elder judgment has followed the property, and brought it to market! In this case, I believe, (I do not speak confidently, not having the papers before me,) the

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fact is *accidentally* otherwise; still this does not weaken the force of the argument.

Entertaining these views of the Statute, I concur in the verdict of affirmance.

WARNER, J. dissenting.

The view which I take of the Act of the General Assembly, passed 19th December, 1822, necessarily compels me to dissent from the judgment of the Court in this case. It appears from the record before me, that Snelling and Buckner both obtained judgments against Charles Evans, in the Inferior Court of Talbot County, at the same term of the Court, in the year 1842. Evans, the defendant in the respective judgments, entered an appeal from the judgment obtained against him by Snelling, to the Superior Court, but did not enter an appeal from Buckner's judgment. Judgment was regularly entered up and signed, in the Inferior Court, against the defendant, in both cases, at the same term of the Court. In March, 1846, the appeal cause was tried in the Superior Court; and Snelling's first judgment was confirmed. From the judgment rendered in favor of Snelling, on the appeal, confirming the first judgment against Evans, an execution issued and was levied on the property of Evans, the defendant, which property had been aliened and sold by Evans, after the signing of the judgment obtained by Snelling against him, in the Inferior Court, but before the signing of the judgment on the appeal. The property of Evans, so aliened and sold by him, between the signing of the first judgment and the signing of the judgment on the appeal, was sold by the Sheriff, by virtue of Snelling's *fi. fa.* and the proceeds of such sale remained in the hands of the Sheriff. At the October Term, 1849, of Talbot Superior Court, Snelling moved a rule against the Sheriff, requiring him to pay over to his *fi. fa.* the money in his hands arising from the sale of Evans' property. Buckner appeared and claimed the money on his *fi. fa.* and contended he was entitled to it, inasmuch as the *lies* of his judgment had priority in point of time over that of Snelling's judgment. The Court below decid-

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ed that Buckner's judgment was entitled to the money, whereupon Snelling excepted.

The question presented by this record is, whether a judgment against a defendant, from which he enters an appeal, operates as a *lien* upon, and *binds* the property of such defendant, when the property is *alienated* and transferred by him *intermediate* the signing of the first judgment and the judgment on the appeal? If the property of the defendant which he alienates and sells, *intermediate* the signing of the first judgment and the judgment on the appeal, is *bound* for the payment of the judgment rendered on the appeal, then it follows, as a necessary consequence, that the *lien* attaches from the signing of the *first* judgment, for the reason, that the property being alienated and sold by the defendant, *before* the rendition of the judgment on the appeal, the latter judgment could not bind it.

The judgment on the appeal, being rendered *after* the defendant has sold the property, that judgment does not create a *lien* upon it or bind it; and if the property so alienated and sold by the defendant, is *bound* for the payment of the creditor's judgment on the appeal, the *lien* attaches, from the date of the *first* judgment, according to the provisions of the first section of the Act of 1822.

By the Judiciary Act of 1799, all the property of the defendant is bound from the signing of the *first* judgment. *Prince*, 426. How bound? For the payment of the judgment creditor's debt. The judgment creates a *lien* upon all the defendant's property, for the payment of that judgment, and if the defendant alienates his property after the date of the judgment, it is still subject to satisfy it. If there had been no appeal from Snelling's judgment, then it will be conceded that Buckner's and Snelling's judgments would have been entitled to a *pro rata* distribution of the money in the hands of the Sheriff, inasmuch as both were obtained at the same term of the Court, and both bound and created a *lien* upon the defendant's property. Does the appeal, by the defendant, from Snelling's judgment, vacate and destroy the *lien* created by the first judgment, so as to defeat his right to have a *pro rata* distribution of the money arising from the sale of property *alienated* by the defendant, applied to his judgment on the appeal, according to the words and intention of the Act of 1822? The preamble to that Act recites, "A contrariety of decisions

having taken place in the different Circuits in this State, as to the time when the property of the party against whom a judgment is entered, shall be bound, *Be it enacted*, That from and after the passing of this Act, all property of the party against whom a verdict shall be entered and a judgment signed thereon, in conformity to the provisions of the 26th section of the Judiciary Act of 1799, shall be bound from the signing of the first judgment, in cases where no appeal is entered; but in cases where an appeal is entered from the first verdict, the property of the party against whom the verdict is rendered, shall not be bound except from the signing of the judgment on the appeal, *except so far as to prevent the alienation by the party of his or their property, between the signing of the first judgment and the signing of the judgment on the appeal.*" Prince, 451.

The object of this Statute is, to settle a definite rule of decision, as to the time when the property of the party, against whom a judgment is entered, shall be bound. The Statute declares, that all the property of the party shall be bound from the time of signing the first judgment, when no appeal is entered, affirming the Judiciary Act of 1799. The Statute then declares, that where an appeal is entered from the first verdict, the property of the party shall not be bound, except from the signing of the judgment on the appeal; that is to say, the property of the party against whom the first judgment shall be signed, shall not be bound from the signing of the first judgment, as declared by the Judiciary Act of 1799, where an appeal is entered, and *repeals* the Judiciary Act of 1799 to that extent. Then follows the exception expressly made by the Act, "Except so far as to prevent the alienation by the party of his, her or their property, between the signing of the first judgment, and the signing of the judgment on the appeal."

By the Judiciary Act of 1799, all the property of the defendant is bound, from the date of the first judgment. By the Act of 1822, the property of the defendant, when it has not been alienated between the date of the first judgment and the date of the judgment on the appeal, is not bound by the signing of the first judgment, but is only bound in cases where an appeal has been entered therefrom, from the time of signing the judgment on the appeal. But with regard to the property which the defendant has alienated, between the date of the first judgment, and the

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date of the judgment on the appeal, that property is *bound* from the date of the *first* judgment, as declared by the Judiciary Act of 1799, and may be taken in satisfaction of the judgment rendered on the appeal. The Act of 1822 never was intended, and does not *repeal* that part of the Judiciary Act of 1799, which declares, that all the property of the defendant shall be bound, from the signing of the *first* judgment, so far as respects the property which the defendant has *alienated*, between the signing the first judgment and the signing the judgment on the appeal, because such property is *expressly excepted* from the operation of the Act of 1822. That Act substantially declares, that in cases where an appeal is entered from the first judgment, the property of the defendant shall not be bound, only from the time of signing judgment on the appeal, except when the defendant shall *alienate* his property, between the date of the first judgment and the date of the judgment on the appeal, and then the property, so alienated by him, shall be *bound* for the satisfaction of the judgment on the appeal, from the date of the *first* judgment, in the same manner as declared by the Judiciary Act of 1799. As I have before said, if the *lien* upon the property alienated by the defendant, is not created by the *first* judgment, it cannot be created by the judgment on the appeal, for the reason, that the defendant has *alienated* the property *before* the judgment on the appeal, and, therefore, the latter judgment could not bind it. I suppose it will be conceded, that Snelling might have levied on the property alienated, sold it, and applied the proceeds thereof in satisfaction of his judgment, but for the judgment of Buckner, which is claimed to have priority of lien. If the *first* judgment of Snelling did not create a *lien* on the property *alienated*—did not *bind* that property from its *date*—on what legal principle could his judgment on the appeal, obtained subsequently to the *alienation* of the property, proceed to sell it as the property of *the defendant*? To authorize Snelling to seize the property *alienated*, in the hands of the purchaser, as the property of *the defendant*, and sell it in satisfaction of his judgment, he must necessarily have had a *lien* upon it; and the property must have been *bound* by that lien, in the hands of the defendant, *before* the alienation thereof to the purchaser. When did that *lien* attach to the property sold by the defendant? When did the property *alienated* become *bound* for the satisfaction of Snelling's judgment? Certainly not from the

time of signing judgment on the appeal, for, at that time, the defendant had sold it. The *lien* was created from the date of the *first* judgment, while the defendant was the owner of the property; the lien was not created by the judgment on the appeal, *after the defendant had sold the property*. When Snelling obtained his judgment on the appeal, its lien related back to the date of the *first* judgment, so as to authorize him to seize and sell the property alienated by the defendant to the purchaser, *as the property of the defendant*. The property was seized in the hands of the purchaser, *as the property of the defendant*, by virtue of a judgment lien of *older* date than the purchaser's title, and was sold by virtue of *that lien, as the property of the defendant*, and the money in the hands of the Sheriff was raised from the sale of *the defendant's property*, by virtue of a lien which bound the property, of *equal* date with Buckner's lien. Both liens were created at the same term of the Court, and both were entitled to a *pro rata* distribution of the money arising from the sale of *the defendant's property*.

One of two propositions must be true, in my judgment. Snelling either had the right to seize the property in the hands of the purchaser, sold by the defendant, between the date of the first judgment and the judgment on the appeal, in satisfaction of his judgment lien against the defendant, or he had not. If it is conceded he had the right to seize and sell the property, by virtue of his *judgment lien, as the property of the defendant*, then his lien was created by the *first* judgment, which is of *equal* date with Buckner's judgment—for Snelling has no judgment lien of *older* date than the sale of the property by the defendant to the purchaser, but the *first* judgment—he has no other judgment lien but that of the *first* judgment, which could have *bound* the property in the hands of the *defendant's* *alienee*. If Snelling, then, had such a *lien*, created by his *first* judgment, as authorized him to seize and sell the property as the property of *the defendant*, does the fact that Buckner has a lien of *equal* date, have the effect to *vacate* or weaken Snelling's lien? Holding, as I do, that Snelling's lien was created by the *first* judgment, and *bound the property alienated by the defendant* from its date—Buckner's judgment having been obtained at the same term of the Court as Snelling's first judgment, their respective liens on *the property of the defendant*, which was sold, being of *equal* date—I am of the

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opinion; that the money in the hands of the Sheriff ought to have been distributed to their respective liens, *pro rata*.

In *Hardee et al. vs. Stovall, Simmons & Co.* (1 Kelly, 92;) I had supposed the same construction was given by this Court to the Act of 1822, for which I now contend. In that case, Stovall, Simmons & Co. obtained a judgment against Byne, at November Term, 1842, of Burke Superior Court, from which an appeal was taken. At the November Term of the Court, 1843, the appeal was dismissed, by consent, and the first judgment confirmed by the order of the Court. While the cause was pending, on the appeal, Hardee et al. obtained judgments against Byne. On a motion to distribute money raised by a sale of the defendant's property, the question was made, whether the judgment of Stovall, Simmons & Co. had a lien on the money of the defendant, from the time of the dismissal of the appeal and the confirmation of the first judgment, or whether their judgment created a lien on the defendant's property from its date, before the appeal? One of the assignments of error in that case was, "that the Court erred in deciding, that when an appeal is entered in any cause in this State, the lien created by the first judgment (except so far as the same arises out of, and is authorized by the Act of 1822) on the property of the defendant, is not destroyed by said appeal."

The plaintiff in error in that case contended, that the lien of the judgment was *vacated* by the appeal, and that when the appeal was dismissed, and the first judgment confirmed, the lien of the judgment attached only from the time of such confirmation, and that Hardee's judgment having been obtained between the entering the appeal and the dismissal thereof, was entitled to the money. This Court ruled in that case, that Stovall, Simmons & Co. were entitled to the money, and affirmed the judgment of the Court on the assignment of error before recited. Speaking of the lien of the judgment, this Court said, "The truth is, that the lien of the judgment, at Common Law, is not *extinguished by the appeal, but suspended*. It is not true, although the appeal opens all the merits of the issue, that it *vacates* the first judgment or verdict. This effect is worked only when, there being a rehearing, there is a new verdict rendered, and a judgment on the appeal; and not even then, as we shall see, so as to authorize *alienation of property, intervening the two judgments*. The appeal is

entered, and, indeed, the privilege of the appeal is given, for the benefit of the appellant. After the appeal is entered, there are cases in which the appellee acquires, by that fact, additional rights; *but the rights of all other persons remain the same.*"

In that case there had not been an *alienation* of property by the defendant, pending the appeal; but, according to my reading of that case, the principle is distinctly asserted, that an appeal does not *vacate* the first judgment, so as to destroy its *lien* on the defendant's property, pending the appeal; and if the lien of the first judgment is *not vacated* by an appeal, where there has been *no alienation of property by the defendant*, pending the appeal, I think the argument drawn from the Act of 1822, is much stronger, when there has been such an *alienation*, intermediate the two judgments.

According to my construction of the Judiciary Act of 1799, and the Act of 1822, and the construction given to the latter Act by this Court, in *Hardee et al. vs. Stovall, Simmons & Co.* I am of the opinion, the judgment of the Court below should be reversed. I am not willing to place it in the power of defendants to defeat creditors, equally vigilant, by giving such a construction to the Act of 1822, as will enable them to enter an appeal, in some particular cases, and then transfer their property, and defeat the lien of the judgment in such appeal cause, on the ground that the judgments not appealed from, have *priority* of date, when the appeal judgment creditor sells the property *alienated by the defendant*, between the signing of the first judgment and the judgment on the appeal; to say nothing of the titles to property which may be *disturbed* by the construction of the Act of 1822, which a majority of the Court feel it to be their duty now to give to it.

No. 23.—JOSEPH WILSON, plaintiff in error, vs. BRANDON & SHANHON, defendants.

[1:] Where, on the trial of a cause, a witness, from mistake, failed to prove a necessary fact to make out the defendant's defence to an action against him—the witness having previously assured the defendant he could and would do so—whereby the defendant was prevented from procuring other testimony to prove the same fact, which it would have been in his power to have done, and a recovery was had in consequence of such mistake, both on the part of the witness and the defendant: *Held*, that such mistake operated as a surprise on the defendant, and that a new trial should be granted, the defendant having shown, upon the record, a good and legal ground of defence to the action.

Motion for new trial, in Talbot Superior Court. - Decided by Judge ALEXANDER, July, 1849.

Brandon & Shanhon brought suit against Joseph Buchanan and Joseph Wilson, on a promissory note, to which Wilson pleaded that he was only surety, and was discharged by indulgence granted by plaintiffs to Buchanan, by contract, for a valuable consideration, paid to the plaintiffs. There was a verdict for plaintiffs below. Wilson moved for a new trial, on the ground that he was surprised on the trial, by the evidence of one Helms, his own witness, who failed to prove that Wilson was surety, after having assured him (Wilson) that he would prove that fact; and that from this assurance of Helms, he had failed to summon two other witnesses, who would prove that fact.

This motion was accompanied by the affidavit of Wilson, that the facts stated in the rule were true; and also the affidavit of one Robinson, that he would have proved that Wilson was surety, if he had been subpoenaed as a witness.

The Court refused to grant a new trial, and this decision is assigned for error.

L. B. SMITH, for plaintiff in error, cited—

Graham on New Trials, 209, 214, 216, 217, 218, 225. *D'Aguias vs. Tobin*, 4 Eng. Com. Law Rep. 363. 17 Ib. 249.

B. HILL, for defendant, cited—

Graham, 187, 220. 2 *Tunst.* 277. 2 *Caines*, 37, 132. 1 *Term* R. 60. 2 *Johns. R.* 425. *Bank St. Marys vs. Mumford & Tyson*, 6 *Ga. Rep.* 45.

By the Court.—WARNER, J. delivering the opinion.

[1.] The defendant in the Court below, made a motion for a new trial in the cause, on the ground of mistake and surprise. To the action of the plaintiffs, the defendant pleaded that he was only security for Buchanan, and that after the note became due, the plaintiffs agreed with Buchanan, the principal debtor, to give him further time for the payment of the note, for a valuable consideration.

On the trial, the defendant proved the truth of his plea, so far as the contract of indulgence was concerned, by Ivey, a witness sworn in his behalf. The defendant then offered Archibald Helms as a witness, to prove that he was only security to the note, but the witness failed to prove that fact, and a verdict was found for the plaintiffs, against the defendant. On the application for new trial, the defendant, Wilson, filed his affidavit, in which he states, that previous to the term of the Court at which the cause was tried, Helms, the witness, assured him that he would recognize the note sued on, and prove that defendant was security to the note; and relying on the promise and assurances of said witness, he failed to procure further evidence of that fact, which he could have done, and that he will be able to do so by other witnesses, if allowed a new trial; that on the trial, Helms failed to identify the note, and failed to prove that defendant was security. The affidavit of Wm. F. Robinson, also, was filed in support of the motion for new trial, in which he states, that he heard one of the plaintiffs say that Wilson, the defendant, signed said note as security for Buchanan. The bill of exceptions shews, that the defendant pleaded a good and legal defence to the action on the note, and sustained it by proof, except as to the fact that he was security to the note, which fact he did not prove, in consequence of being misled by the witness, and that he was taken by surprise on the trial, in consequence of the witness failing to prove what

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he had assured him he would prove, and that he was prevented, by the assurance of the witness, from procuring the testimony of other witnesses, to prove that he was security, which the record shows he could have done. Applications of this sort for new trials, ought to be closely scrutinized, so as to guard against the abuse of a rule, intended for the advancement of justice; but where there has been, as in this case, a *blameless mistake*, and an *injury* to the party, resulting from such mistake, a new trial, in our judgment, ought to be granted. The defendant here exercised ordinary care and diligence to procure the testimony necessary to make out his defence. He proved by Ivey the contract for indulgence of the principal in the note, for a valuable consideration, and had a right to suppose that he could prove the fact of his being security to the note, by Helms, when he assured him he could and would prove that fact; but the result shewed he was *mistaken*, and that mistake was occasioned by the conduct of the witness: by his promise and assurance, the defendant was prevented from procuring the testimony of other witnesses, to prove the fact the witness assured him he would prove, whereby the defendant has been injured the amount of the recovery against him. In *D'Aguilar vs. Tobin*, (4 *English Com. Law Rep.* 362,) it was held, in an action on a policy, that where the defendant, by the mistake of his witness, failed in producing the necessary document from the Admiralty, for proving a breach of the Convoy Act, the Court granted a new trial, in order to let him into his defence, after verdict found for the plaintiff on the merits. Now, it may be said that the witness, Helms, was mistaken as to what he could prove, with regard to the defendant being security to the note. Concede this to be so, and yet, after his assurance to the defendant, that he would prove that fact, before the trial, and his failure to do so at the trial, did not operate any the less as a *surprise* to the defendant, who had relied on his testimony to make out his defence. The merits of this application, as well as the justice of the cause, require that a new trial should be granted, and for that purpose, we reverse the judgment of the Court below.

SUPREME COURT OF GEORGIA,

MACON TERM, 1850.

TUESDAY, February 12.

The Honorable Supreme Court met pursuant to adjournment, &c.

Upon motion of Hon. C. B. Cole, a committee was appointed by the Court to report, to-morrow morning, suitable resolutions in regard to the death of WM. H. ANDERSON, Esq. late a Member of the Bar of this Court; whereupon, the Court appointed Hon. C. B. Cole, Hon. C. B. Strong, Hon. C. J. McDonald, Hon. A. H. Chappell and O. C. Gibson, Esq.

WEDNESDAY, February 13.

The Hon. Supreme Court met, &c.

Hon. C. B. Cole, from the committee appointed yesterday, made the following Report, which, upon being read, was ordered to be placed upon the minutes.

WM. HENRY ANDERSON having departed this life since the last term of this Court for this District, we embrace the first opportunity to express our profound and heartfelt respect for the memory of our young and gifted brother.

Six months ago, Mr. ANDERSON appeared before this Court, at Decatur, buoyant with hope and health, and in possession of all his bodily and mental powers, ready to compete with the ablest, in the glorious struggle for intellectual supremacy. He is now a clod of the valley—a tenant of the cold and cheerless grave. What a commentary on the value of human pursuits and human objects! What a lesson to his survivors, on the frail tenure of earthly existence, and the baseless structure of all earthly hopes and earthly greatness!

Mr. ANDERSON was born and educated in Virginia, and came to this city a little more than a year ago, and commenced the practice of law, with the most flattering prospects. Nature had

gifted him with a fine and commanding person, and a mind at once clear, comprehensive and energetic, which he had carefully cultivated and stored with a fund of professional and general knowledge.

In his disposition, he was frank, friendly and sociable; in his intercourse with the world, he was, in all respects, the finished gentleman; in his family, he was most exemplary, and all that a fond and affectionate husband and brother could be. No wonder, then, that the early and unexpected death of such a man should electrify a whole community, and should be most deeply deplored—it would be matter of surprise if it were not so. Indifference and apathy at such an event would mark, with a foul blot, the moral sense and feeling of any community.

To his bereaved wife, his death is truly irreparable. In the apparent enjoyment of robust health, and with the prospect of many years of domestic happiness in the bosom of his family, he is suddenly seized with the fatal malady that snatches him from their embraces, and transfers him to an early grave, but, as we hope, to a brighter and happier world.

Most sincerely do we sympathize with the mourning relations of our deceased brother. Their grief can now admit of little consolation—time alone can assuage it—a resigned submission to the inscrutable, but unerring decree of overruling Providence, can alone mitigate its poignancy.

The husband and friend has descended to the threshold of his usefulness, but in the full meridian of his talents; leaving to them as a rich inheritance, a name without a stain, and a character of superior knowledge as a lawyer and exalted worth as a man.

Resolved, therefore, That we deeply deplore the early death of our young and much esteemed brother, WILLIAM HENRY ANDERSON.

Resolved, That we sincerely condole with the bereaved wife and family of our deceased brother.

Resolved, That for the purpose of rendering merited honor to his memory, and of perpetuating, as far as it is possible to perpetuate, this expression of our love and respect for our deceased brother, we will wear the usual badge of mourning for thirty days, and request the Court to enter these proceedings on its records, and transmit a copy to his family.

Upon the reading of the report and resolutions, Judge LUMKIN, from the Court, responded as follows :

Mr. Chairman and Gentlemen of the Bar :

My response to your report will be brief, for the reason that my acquaintance with our deceased brother was exceedingly limited. I met him, for the first and last time, at the August Term of this Court, at Decatur, where, it seems, he contracted the fatal malady which has hurried him so rapidly to the tomb.

I well remember his striking personal appearance—his manly beauty of face and form—his respectful bearing toward the Bench, so befitting a stranger—his courteous demeanor toward the Bar, so becoming at all times, a professional gentleman.

He appeared before us in behalf of an unfortunate fellow-being, who had been convicted of murder. Among other grounds taken in his behalf, was the refusal by the Circuit Court, to grant the prisoner a *new trial*, for the reason that, owing to the popular prejudice, he could not get justice. It appeared, from the record, that in addition to the oath of the accused, several other affidavits were submitted to the presiding Judge, to the effect, that no such excitement prevailed in the community, as would prevent a fair and impartial trial ; but whether this contradictory evidence was elicited by the State or the defendant, was not stated. If adduced by the prosecution, it was irregular, and should not have been considered—if by the prisoner, it authorized the Court to exercise its discretion and refuse the continuance.

Unwilling to refuse a re-hearing upon a mere rigid rule of law, namely, that the record must show, *affirmatively*, that the judgment below was wrong, the question was propounded, by one of my colleagues, to the deceased, as to the truth of the case. He had reason to suppose, that the fate of his client was suspended upon his answer. Still he did not hesitate. He responded modestly, but firmly, that the additional testimony was offered by the accused.

This incident fixed the character of Mr. ANDERSON in my esteem—it will never be obliterated from my recollection. *Chastity* is the strength and bulwark of woman's character—devotion to *truth*, that of man's. So long as he rigidly adheres to *truth*, under all circumstances, however pressing the temptation—he may

Tribute of Respect to the Memory of Wm. H. Anderson.

be addicted to drunkenness, or any other unfortunate habit—he is still—"a man for a' that."

Let the resolutions be entered on the Minutes of the Court, as a lasting memorial of the estimation in which our departed brother was held by the members of this Court, and of the Bar with which he was associated.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MACON,
FEBRUARY TERM, 1850.

No. 24.—**BERRY RODGERS**, plaintiff in error, *vs.* **JOHN P. EVANS**,
defendant.

- [1.] The judgment of a Court which has no jurisdiction of the cause, is entirely void.
- [2.] But ~~where~~ the Court has jurisdiction of the cause and parties, and only proceeds *erroneously*, the judgment, notwithstanding such error, is binding, until it is vacated or reversed.
- [3.] Upon an affidavit of illegality, to the execution, ~~the validity~~ of the judgment cannot be attacked.

Levy and illegality, in Bibb Superior Court. Decision at July Term, 1849, by Judge FLDING.

It appears that one W. J. Dollock had obtained a *fi. fa. vs.* R. K. Evans, J. P. Evans and Berry Rodgers, in February, 1841, for \$206 16; that Rodgers paid it off, and at the November Term, 1842, of Bibb Superior Court, obtained an order of control, under the Act of 1840. The order recites, that Rodgers was the last indorser on the note—the foundation of the said *fi. fa.*; that he had been compelled to pay it in full; and that, *by testi-*

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money, it appeared to the Court, that J. P. Evans, though occupying the place of first indorser, was, in fact, the principal in the debt; and then orders that Rodgers have the use and control thereof, to reimburse himself to the whole amount, as against J. P. Evans, but only as to half, as against the other *real* indorser, R. K. Evans.

In November, 1848, this *fi. fa.* was levied on certain property in possession of Jno. P. Evans, to which he took illegality, on the following grounds:

1st. Because he alleged that said *fi. fa.* had been paid off by Rodgers, one of the defendants.

2d. Because it was being used by one indorser against another indorser; and this could be done in the case of *fi. fas.* founded on bankable paper alone.

At July Term, 1849, the illegality was sustained, on the ground that "the facts being sustained by the records and proceedings in the cause, and said Rodgers having paid said *fi. fa.* he was not entitled to control the same against said J. P. Evans." The counsel for Rodgers, then and there objecting to said illegality, for the reasons—

1st. That it nowhere appeared that said *fi. fa.* had been paid by J. P. Evans.

2d. That by the order of the Superior Court, at November Adjourned Term, 1842, the control had been given to said Rodgers, and that said order was in force, unrevoked, and made by a Court of competent jurisdiction.

3d. Because the facts stated in said illegality, if true, are not sufficient to arrest or annul it; and said Rodgers is entitled to collect the money due on said *fi. fa.* from said J. P. Evans.

Which grounds of motion to dismiss the illegality, the Court, as said, overruled; and counsel for Rodgers excepted; and thus the case comes up.

STUBBS and LESTER, for plaintiff in error, cited—

4 *Bac. Abr.* 106, 115, 116, 117. *Yelverton*, 68. *Chitty's Practice*, 275.

POWERS, (representing McDonald,) for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

The order of November, 1842, declaring John P. Evans the principal debtor, in the note which Berry Rodgers was compelled to pay, and giving to Rodgers, as indorser, the use and control of the judgment, to re-imburse himself as security, certainly entitled him to the execution, which he has caused to be issued thereon, and which has been arrested by the affidavit of *illegality*, interposed by the defendant; and being passed by a Court of competent jurisdiction, and remaining in full force, we know of no authority in this, or any other Court, to treat it as a nullity. On the contrary, the presumption is *omnia rite acta*. Any other course would overturn the landmarks of property.

In *Rose vs. Himely*, 4 Cranch, 278, it is said, if a judgment be merely irregular, the Courts of the country pronouncing the sentence, are the exclusive judges of that irregularity, and their decision binds the world. So, in *Kempe's Lessees vs. Kenedy*, 5 *Id.* 186, the Supreme Court of the United States say—"The judgment it gave was *erroneous*, but it is a judgment, and until reversed, it cannot be disregarded." In *Windham vs. Windham*, 3 *Ch. Rep.* 12, an indirect attack was made upon the decree of a Court of Equity, ordering a sale—whereupon, the Lord Keeper remarked—"You blow up with gunpowder the whole jurisdiction, if such a purchaser is not protected."

We take this to be the true distinction, and to be well settled by the authorities.

[1.] A judgment of a Court which has no jurisdiction of the cause, is entirely void.

[2.] But where the Court has jurisdiction both of the cause and the parties, and proceeds *erroneously*, the judgment, notwithstanding the error, is binding, until it is vacated or reversed. *Gorrill vs. Whittier*, 3 *N. H. Rep.* 269. *The Case of the Marshalsea*, 10 *Co.* 76. *Elliot vs. Piersol*, 1 *Pet. S. C. Rep.* 340. *Smith vs. Shaw*, 12 *Johns. Rep.* 256, 267. *Lotham vs. Edgerton*, 9 *Cowan's R.* 227. *Brown vs. Crampton*, 8 *D. & E.* 424. *Hecker vs. Jarratt*, 3 *Bin.* 410. *Prescott vs. Hull*, 17 *Johns. R.* 290. *Holmes vs. Remson*, 20 *Johns. R.* 268. *The same parties*, 4 *Johns. Ch. R.* 460, and the cases there cited. *Homer vs. Fish et al.* 1

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Pick. Rep. 435. *Saxton vs. Chamberlain*, 6 *Pick R.* 422. *Minor vs. Walker*, 17 *Mass. R.* 237. See also 3 *Pick.* 33. 4 *Ib.* 228. 7 *Ib.* 341. 8 *Ib.* 113.

Without denying the *validity* of this order, we held, when the same parties were before us in August, 1846, (1 *Kelly*, 463,) that neither the order, nor any of the numerous Statutes which had been passed for the relief of securities, authorized the *capias ad satisfaciendum* which was first issued at the instance of Rodgers; and we characterized the November order itself, on that occasion, as a "most anomalous" proceeding. And it is due to the Circuit Judge, who rendered the judgment against the *fi. fa.* which we are now called on to review, to state, that he was probably misled by the reasoning of the Court in that case, to pronounce the opinion which he did in the present case. Still, it was not our intention to assume the power to vacate that order, however improperly and irregularly granted.

[3.] Especially, we apprehend, can this not be done, in this proceeding of *illegality*, the object of which is, not to be delivered against an unjust judgment, by setting it aside; but conceding the rightfulness of the judgment, it resists the *execution*, on account of some injustice in the party who seeks to enforce it.

The judgment below must, therefore, be reversed.

No. 25.—AMOS BENTON, plaintiff in error, vs. JOSEPH W. PATTERSON, defendant in *fi. fa.* and DRURY THOMPSON, trustee, claimant and defendant in error.

[1.] P devised the whole of her estate to G, as trustee and testamentary guardian, for the exclusive use of her three daughters, W, A and B, and their increase, if any, to be distributed, &c.; and in the event of the death of either of the daughters, without issue, her portion of the property to go to the survivor or survivors—if two, share and share alike—if one, to her exclusively; and should all three die, without increase or issue, G, the trustee and testamentary guardian, is directed to deliver over the entire estate to

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C E; and he is vested with plenary power to do any way with the property, that, in his wisdom, may seem best: *Held*, that the will did not create an *estate tail*, especially since such estates were long since abolished by law in this State; but the same was an estate for life in the daughters, with remainder in fee to their children or grand children; and that if the daughters died without children or grand children, it was a good limitation over in fee, by way of executory decree, to C E, on failure of increase at the death of the daughters.

Levy and claim, in Bibb Superior Court. Decision at July Term, 1849, by Judge FLOYD.

The facts in this case were agreed upon as follows: *A. fi. fa.* (*Amos Benton vs. Jos. W. Patterson*, to July Term, 1849, dated 5th February, 1849,) was levied on certain slaves or their issue, embraced by the will hereafter recited; that Patterson, after said judgment, had intermarried with Virginia C. Wilkinson, and was in possession of said property at the levy, worth \$1500; that the wife of Patterson was the daughter of Cecilia Porter, and once the widow of William L. Wilkinson; that the latter died in 1838 or 1839; that his widow remained *sole* until May, 1849, and then married Patterson; that after this marriage, and after the levy, Drury Thompson was appointed trustee for said Virginia and her children; that this is a copy of Cecilia Porter's will:

"GEORGIA, WILKES COUNTY:

"In the name of God, amen: I, Cecilia Porter, of the County and State aforesaid, being at this time in a declining state of health, but of sound disposing mind and memory, do make, constitute and appoint this, my last will and testament, in manner and form following, to wit:

"Item 1. It is my will and desire, that out of my estate all of my just debts be paid.

"Item 2. After the payment of all my just debts, it is my desire, that the remainder of the property, both real and personal, be divided into three equal portions or shares, as near as practicable, to be distributed by my trustee or testamentary guardian, hereinafter appointed, between my three daughters, Virginia Wilkinson, wife of William L. Wilkinson, Frances Wellborn, wife of John G. Wellborn, and Eleanor Walton.

"On account of the danger to which property of legatees, es-

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pecially females, is frequently exposed, in consequence of the embarrassment or mismanagement of their husbands, thereby not unfrequently depriving them of support, and leaving them in a helpless and forlorn condition, I have thought it proper to prevent such sad consequences, so far as can be effected by my own precaution, or the kind and faithful agency of friends. To the end, therefore, and for this purpose, I hereby constitute and appoint Augustus H. Gibson, my trusty friend, as trustee or testamentary guardian of my before named daughters, Virginia Wilkinson, Frances Wellborn and Eleanor Walton; reposing in his special trust whatever property may fall to all or each of them after my decease.

"It is farther my will and desire, that my said trustee recover, as early as possible after my death, the entire amount of my estate, and after complying with the requisition to pay my just debts, then manage the remainder as he may deem to the best advantage of my aforesaid three daughters, in order that he may have no trouble with their husbands or others, or with the Court of Ordinary.

"It is farther my will, that my trustee reserve to himself fifty dollars, annually, out of the proceeds of my estate, as a compensation for his trouble and services; and here let it be distinctly explained and understood, that the property thus devised to the trustee and testamentary guardian, is exclusively intended for the use and benefit of my three daughters and their increase, if any. And whereas, I have a claim now pending in the Superior Court of this County, against the guardian of Thomas C. Porter, for a considerable amount, it is my will and desire, that if in the event of the recovery, whatever it may be, be thrown into my general estate, and be distributed as above pointed out.

"Item 3. I hereby constitute and appoint Augustus H. Gibson, the trustee and testamentary guardian aforesaid, executor also of this my last will and testament, relying with full confidence on his worth, and well satisfied that he will not betray his trust—hereby revoking all others by me heretofore made.

"In witness whereof, I have hereunto set my hand and affixed my seal, the 14th day of January, 1830."

To which will there was this codicil:

"GEORGIA, WILKES COUNTY:

"I, Cecilia Porter, of the County and State aforesaid, do publish and declare this codicil to my last will and testament:

"Item. In the event of the death of either of my daughters, mentioned in the preceding and foregoing, without issue, it is my will and desire, that their proportion of the property therein conveyed, revert to and become the property of the survivor or survivors—if two, share and share alike—if one, her's exclusively; and should all three of my daughters depart this life without, it is my will, that the trustee or testamentary guardian, appointed in the foregoing will, deliver over to Caroline Echols, wife of Simeon Echols, the entire amount of the property devised in this my will, to her and her issue, forever. Discretionary power is hereby given to the trustee or testamentary guardian, either to work all the hands jointly upon the plantation whereon I now reside, and divide the proceeds among my children, in just and equal proportions, or to sell the lands and purchase one of cheaper value; if he thinks proper, or at all events to act and do in any manner or way with the property that, in his wisdom, may seem best. This I have inserted in this codicil, in order that he and all concerned may discover that it is my will and intention, that he shall have absolute power and sole control over all and every thing relating to, or in any way appertaining to the provisions of this instrument.

"In witness whereof, &c. 14th January, 1830."

It was farther admitted, that these papers were duly proven and recorded; that plaintiff below claimed that said property levied on was subject; that Judge *Floyd* ruled that the property was *not* subject, and ordered the levies dismissed; whereupon, attorneys for Benton excepted, and assigned for error, that in the case made by said record, said property is subject.

POWERS & STUBBS, for plaintiff in error.

POWERS, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Are the four negroes levied on subject to be seized and sold as the property of Patterson, the defendant in execution?

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The answer to this question depends upon the construction to be put upon the will of Mrs. Cecilia Porter. If the bequest to her daughter, *Mrs. Wilkinson*, (at the time of making the will,) now *Mrs. Patterson*, created an estate tail in these slaves, then, under the Act of 1821, the daughter of the testatrix took an absolute fee, which being held in trust, for her sole and separate use, during her first coverture, vested at the death of Wilkinson, and by virtue of the marital rights, became the property of Patterson, upon her intermarriage with him, and is consequently subject to the *fi. fa.*

The whole will must be considered together, and it will not do to rest the construction upon any particular clause. Looking, then, to the entire instrument, did the testatrix intend to describe a class of persons who should take in succession, from generation to generation, in all coming time, or did she design to bequeath the negroes to her daughter for life, with remainder, at her death, to her children or grand children? If the former purpose is apparent, and that the object of the testatrix was to entail this property upon the lineal descendants of her daughter, then such intention being unlawful, cannot be executed; but if, on the other hand, the Court should come to the conclusion, that the contrary is true, and that she merely intended to describe the persons who were to take after the death of her daughter, the words of the will will be construed to be words of *purchase* and not of *limitation*.

Four tests have been applied by the Courts, for the purpose of ascertaining the *nature* of the estate intended to be created; and notwithstanding the words of the instrument would, *per se*, be construed into a limitation, yet they will be held to be words of purchase, either where no estate of freehold is given to the ancestor, or where no estate of inheritance is given to the heir, or where a new inheritance is grafted on the words of entail, or, lastly, where explanatory words are superadded.

Passing by the first three, we propose briefly to apply the fourth test to this will. The whole estate of the testatrix is devised to her trusty friend, Augustus H. Gibson, "as trustee and testamentary guardian," and she wishes it distinctly understood, that it is "exclusively intended for the use and benefit of her three daughters, and *their increase, if any.*" Mr. Gibson is appointed *testamentary guardian* as well as trustee. Of whom?

Why, the *children or grand children* of the testatrix, born of the three daughters. These are, manifestly, *the increase, if any*, designated in this clause. Again, the testatrix speaks of her property being *distributed, &c.* And I need not remark, that the idea of *distribution* is antagonistic to that of *perpetuity or inalienability*. And then, if either of the three daughters die without issue, her portion of the property is "to go to the *survivor or survivors*—if two, share and share alike—if one, to her exclusively;" and in the event of all dying without increase or issue, the trustee or testamentary guardian is "to deliver over the entire estate to Caroline Echols;" and in conclusion, Mr. Gibson is clothed with plenary powers "to do in any manner with the property that, in his wisdom, may seem best."

It can hardly be believed, that the act to be performed here, by the trustee or testamentary guardian, namely, the delivery over of the property to Mrs. Echols, should all the daughters die without issue or increase, could mean, in the mind of the testatrix, whenever their descendants should become extinct, sooner or later, and without reference to any particular time, or any particular event. On the contrary, we believe the very converse of this proposition is fairly and legitimately deducible from these various superadded words, to wit: that she had reference to the period of the death of her daughters, and to their issue living at that time.

It will be recollected, that the rule in *Shelly's case*, was made to effectuate the intention of testators, not to disappoint them—that it was established by the *English Courts*, when estates tail were not only lawful but common. It was, therefore, just to infer, in that country, that the testator intended to create such an estate; but here, if such estates ever did exist, they have certainly been abolished since 1777. *Watkins' Digest*, 15. For myself, I should hold, that whatever technical words are used in the instrument, whenever the devise over is to a person or persons then in life, *as survivor*, that they ought to be interpreted to import a failure of issue at the time of the death of the first devisee, and that they do not mean a general or indefinite failure of issue.

And many of the State adjudications in this country have gone to this extent, rather than adopt an unbending rule which, by implication, would turn an express estate for life, with limitations over in remainder, into a *fee tail*, and thus defeat the intention of

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the testator. I will content myself by referring to the case of *Hudson vs. Jackson*, (16 Johns. Rep. 382,) because it contains the most thorough examination and elaborate discussion of this whole doctrine that is to be found anywhere in the books, not excepting even the case of *Perrin and Blake*.

He devised a farm to his son Joseph, his heirs, &c. forever, and another farm to his son Medcef, his heirs, &c. forever, and added, *it is my will, that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor; and in case of both their deaths, without lawful issue, he gave the property to his brother and sister in England.* Joseph died without lawful issue. It was held by the Supreme Court, and their judgment affirmed by the Court of Errors, that the words did not create an estate tail, especially since the Statute abolishing entails, but was a good limitation over in fee, by way of executory devise to the survivor, on failure of issue living at the death of either of the sons.

It will be perceived, that the words in the will of Medcef Eden, the elder, were, "*dying without issue*;" standing, too, without any other words or circumstances of intention; and is distinguishable in this, as well as many other of its features, from the case presented in this record; and still it was considered, that while estates tail are presumed in England, because allowed by Act of Parliament, that fee simples are presumed in this country, because directed by law. I repeat, that in view of this difference, the Court held, that there was no rigid, inflexible rule of law to wrest the plain and manifest purpose of the testator to one altogether different from what he intended.

Favoring as we do, the intention of the testatrix—and particularly in a devise of personal property—and gladly taking hold of any words in the will, which will afford a ground for construing the instrument in such a way as will support the devise over, the opinion of this Court is, that it is fairly to be collected, from the language and provisions of this whole will, that Mrs. Porter intended that her daughter should take an estate for life in these slaves, with remainder in fee to her children or grand children, which the record shows are in case; for the claim is interposed in their behalf, as well as on account of their mother.

Let the judgment of the Superior Court, therefore, be affirmed.

No. 26.—DAVID J. DAVIS, plaintiff in error, vs. JANE IRWIN, defendant in error.

[1.] Where a Sheriff sold negroes under executions, at a Sheriff's sale, and delivered one of the negroes to the purchaser, with the understanding that the Sheriff was to call at a certain bank the next morning, and receive a check for the purchase money; when the Sheriff called at the bank next morning, for the check, it was refused, under instructions from the purchaser, because the negro had run away, or been carried off, the night before: *Held*, that the Sheriff was liable to be ruled, at the instance of the defendant in the executions, for the balance of the purchase money of the slaves, after paying off the amount thereof, and costs: *Held*, also, that the delivery of the slave to the purchaser, by the Sheriff, under the circumstances before stated, was a matter exclusively between the purchaser and the Sheriff, with which the defendant in execution had no concern, although her agent was present when the arrangement was made between the purchaser and Sheriff.

[2.] When a rule is made absolute against a Sheriff, for the payment of money, an attachment cannot issue thereon against him, until he is first called on to shew cause why an attachment should not issue.

Rule against a Sheriff, by defendant in *f. fa.* for surplus of sale. Decision in Bibb Superior Court, at July Term, 1849, by Judge Floyd.

D. J. Davis, Sheriff, levied certain *f. fas.* upon certain slaves of Jane Irwin, and in May, 1849, he sold Kitty, Mary, and Polly. The proceeds were enough to pay off the *f. fas.* in hand, (and perhaps other claims assented to by defendant,) and then to leave a surplus in his hands. He was ruled, by defendant, to pay over to her said surplus. Davis showed for cause, that by consent of plaintiff and defendant, he levied on certain slaves—among them, Kitty, Mary and Polly; that after the levy, they agreed that Scott Cray should take possession of, and hire out said slaves, for defendant's sole use; that after doing so for some time, said Cray became tired of the trust; that it was then agreed that Wm. Collins should hold them, upon a like trust, and who did so until the day of sale, when said slaves were brought forward by said Wm. Collins, and sold at the prices named, (in said showing,) and that he disposed of the proceeds of Kitty and Mary, but that Polly was not paid for; that she was bid off by A. H. Chappell, and delivered to him in presence of said Collins; that said Collins at-

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tended and managed said sale; that he, Davis, had not had the custody or control of said slaves after the levy, and was not considered, by either party, as responsible therefor; that the purchaser, when Polly was let off, in the hearing of Wm. Collins, gave her directions where to go—saying he would send there for her next morning, and telling the Sheriff he would leave a check for the purchase money, next day, at a particular bank agency, and requested him to call and get it; that he did call, and it was refused, because, as was said, the purchaser had so instructed, upon the ground that said Polly had run away, or was carried off in the night; and that he, Davis, had not then heard of the slave, or received the purchase money.

Sheriff's counsel moved to discharge the rule (the showing not being controverted)—

1st. Because it did not appear that said Sheriff was in contempt of said Court, or of its legitimate authority.

2d. Because the Sheriff, in the whole matter, acted as the private agent of the parties, at their mutual request, and not in his official character as Sheriff, and is liable at all, is not so in this form of action.

Which motion the Court overruled, and passed an order making the rule *nisi absolute*, that the money be paid in sixty days, or that an attachment instantly proceed, ordering that, in such event, he be committed without bail, &c.

To which last named rule, or order absolute, Sheriff's counsel excepted, on the ground that the Court erred in granting an attachment absolute, without first calling on the respondent by an attachment *nisi*; and further, because it nowhere appears that said officer was in contempt of the process of the Court.

S. HALL and STUBBS, for plaintiff in error, cited—

Gorham vs. Gale, 7 Cowan, 739. *Bethune vs. Bonner*, 2 Kelly, 169. *Richmond vs. Bowditch*, 1 Mces. & Wells, 40. 1 Tidd. Pr. 480. *Prince's Digest*, 430, 431, 432.

MCDONALD and POWERS, for defendant.

By the Court.—WARNER, J. delivering the opinion:

[1.] It appears, from the record, that the plaintiff in error sold certain negroes, as Sheriff of Bibb County, belonging to the defendant, by virtue of certain *f. fas.* placed in his hands against her. After paying off *the f. fas.* and costs, there remained a balance in the hands of the Sheriff, arising from the sale of the defendant's property. A *rule nisi* was taken against the Sheriff, at the instance of the defendant, calling upon him to shew cause why he should not pay over to her the money remaining in his hands, arising from the sale of her property, after paying off the executions, &c. The Sheriff shewed for cause, that at the time of the sale, one Collins acted as the agent of defendant; that a slave, by the name of Polly, was bid off by A. H. Chappell, and was delivered to him by the Sheriff, in the presence of defendant's agent; that Chappell directed the slave so purchased by him, to procure a dray, and take her things to Dr. Lamar's residence, and that he would send for her next morning—at the same time, Chappell informed the Sheriff that he would leave a check for the purchase money of said slave with N. C. Munroe, at the Agency of the Mechanics' Bank at Macon—requesting the Sheriff to call the next morning and get it; that when the Sheriff called for the check the next morning, Munroe refused it, under Chappell's instructions, upon the ground that said negro ran away, or was carried off, during the previous night. For the Sheriff, it is insisted, that he is not liable to be ruled for the money in his hands, at the instance of the defendant in execution, and that if he is subject to be ruled at her instance, that her agent being present, and cognizant of all the foregoing circumstances, her assent thereto will be presumed, and constitute a good defence for the Sheriff, against the rule. The fact that the defendant's agent was present at the time the arrangement was made between the Sheriff and the purchaser of the slave, for the payment of the purchase money, is no defence for the Sheriff. Had the defendant herself been present, she would have had no right to interpose any objections to any stipulation or agreement that the Sheriff and the purchaser of the slave might think proper to have made, as to the payment of the purchase money, or as to the delivery of the slave. The title of the defendant was divested by the Sheriff's sale, and she or her agent had nothing more to do with the property. If the Sheriff thought proper to deliver the property to the purchaser, without payment of the purchase money,

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he did so upon his own responsibility; that was a matter between himself and the purchaser, with which the defendant in execution had no concern. The Sheriff was responsible to the persons interested, for the proceeds of the sale; and the 49th and 52d sections of the Judiciary Act of 1799, are sufficiently broad, as regards the liability of Sheriffs in this State, to authorize the Court to entertain a rule for money raised by virtue of a sale under executions, at the instance of a defendant in such executions. *Prince, 431, '2.*

[2.] The Court below made the rule absolute against the Sheriff, for the payment of the money within sixty days, and in default of such payment, ordered an attachment instantly to issue against him, and that he be committed, without bail or mainprize, until the payment thereof. The error alleged to the judgment of the Court below is, that after the rule was made absolute against the Sheriff, for the payment of the money, an attachment was ordered to issue against him, without first calling on the Sheriff to shew cause why the attachment should not issue against him. This objection, we think, was well taken. After the rule was made absolute, and the Sheriff ordered to pay over the money, the *subsequent* process of attachment ought not to issue against him until he has first been heard, or at least, had an opportunity of being heard; for the reason, he may have good cause to shew why he should not be attached and imprisoned. This appears to have been the practice in England; and we think it is the most reasonable and better practice. See *Richmond vs. Bowditch, 1 Mason & Welsby's Rep. 38.*

On the last ground taken, the judgment of the Court below must be reversed.

No. 27.—THE MACON & WESTERN RAIL ROAD COMPANY, plaintiff in error, vs. PHILIP S. HOLT, defendant in error.

- [1.] A passport or ticket to a slave, must specify the length of time that he is to be absent, and the places which he is allowed to visit.
- [2.] The Macon & W. R. R. Company took on board their cars the slave of H, having a general pass, and without the knowledge and consent of H, to transport him to a given point, for the usual fare for negroes: Held, that this was a conversion of the slave, and that the company are liable for all the injuries which he received, whether they occurred by the negligence of the company or otherwise.
- [3.] The black color of the African race is *prima facie* evidence of slavery.

Action on the case, in Bibb Superior Court. Tried at July Term, 1849, before Judge FLOYD.

A slave named Jacob, the property of Philip S. Holt, having an ordinary "pass" to go from Macon to his owner's place, some eight or ten miles out, was received by the officers of the plaintiff in error, on board its freight train of cars, for the usual passage money for slaves riding on the freight train. The negro, in getting from the cars, within 250 or 300 yards of the station to which he had paid, (the cars being still in motion,) *had his leg broken*. The master had no knowledge that the negro was going to ride on the cars, and it appeared in proof, that there was no negligence by the company; that the negro *jumped off*, of his own accord, just before reaching the eight mile post, to which he had paid, while the motion was about as fast as a man could walk.

The bill of exceptions arises alone out of the charge of the Court, to this part of it—"If the company took the negro on their cars, without the knowledge and consent of the owner, and he be injured by negligence or *otherwise*, the company will be liable, though the negro have a general pass."

Holt recovered below, and the company excepts on the ground stated.

FOX and NISBET, for plaintiff in error.

POWERS and WHITTLE, for defendant.

By the Court.—NISBET, J. delivering the opinion.

The facts in this case are few and simple. Jacob, a slave, belonging to Mr. Holt, the defendant in error, having in his possession what the witness designates as "an ordinary pass," was received on board the cars of the plaintiffs in error, the Macon & Western Rail Road Company, to be transported, for the ordinary fare for negroes, from Macon to the eight mile post above, on the road. Upon approaching the point at which he was to leave the train, its progress was impeded with a view to stop and let him off. Before reaching that point, and the train moving "about as fast as a man can walk," he jumped off and fractured his leg—it was afterwards amputated; and this action was brought by the defendant in error, to recover of the company damages for the injury sustained by the slave. No negligence of any kind is imputable to the company or any of its agents. Upon the trial below, Judge *Floyd* instructed the Jury, "that if the negro was on board the cars with the consent of his owner, or with his knowledge, and no prohibition be given by the owner, then, if the company take ordinary care, and he be injured by his own volition, the company will not be liable; *but if the company take the negro on the cars without the knowledge and consent of the owner, and he be injured, by negligence or otherwise, the company will be liable, though the negro have a general pass.*" To the last division of this charge, exception is taken by the Macon & Western R. R. Company, and the question for the review and determination of this Court is, whether there is error in that part of the instructions of Judge *Floyd* to the Jury.

[1.] By *general pass*, the presiding Judge, no doubt, meant the ordinary permit or ticket which the law requires to be given to slaves, to protect them from being whipped, when found away from the plantations, not being in company with some white person. By the Act of 1770, when so found, they are liable to be taken up and whipped, not exceeding twenty lashes. *Prince*, 778. By the Act of December, 1829, the character of this permit is defined. It is therein enacted, "that it shall be the duty of every owner, overseer, trustee, guardian or other person or persons, having control of any slave or slaves, or free persons of color, in granting or giving written permits to the same, to set

forth the time allowed for their absence, and distinctly designate the place or places where such slaves or free persons of color desire to visit." *Hutchins*, 815. The testimony of the witness in this case is, that the slave, Jacob, had an *ordinary pass*, and the presiding Judge, in his charge, speaks of a *general pass*. We infer that the Judge referred to such a permit as is required by the Act of 1829. No permit, more general than that Statute requires, would be a lawful pass—one in conformity with it, would be a *general pass*. An owner, overseer, trustee, guardian or other person, having control of slaves, can unquestionably authorize them, in writing, to do or not to do, any thing not forbidden by the laws. They may thus permit them to travel from place to place on the rail roads; and such a license would protect both the slave and the company. A general pass, however, such as I have defined it to be, was held by Judge *Floyd*, to be no protection to a *rail road company* against damages for injury to a slave, taken on board the cars without the knowledge and consent of the owner; and, in our judgment, correctly held. It conveys no authority to the slave to place himself on the cars—it clothes him with no contracting power, for and on account of the owner—it confers upon others no right of control over him, whatever, much less a right to convert him to their uses for profit—it is not evidence of the assent of the owner, except according to its terms—it proves the master's consent that the slave may, for a time specified, leave his home, and this includes the privilege of enjoying that time in such way as he may choose to occupy it, in conformity with the laws of the State, and it also proves his consent that he shall visit the place or places specified—it proves nothing more. It is made the duty of the owner, by law, not to permit his slave to leave his plantation without a ticket—it is the right of the slave, founded in his character as a sentient human creature, and in the obligations of humanity, when leaving his master's protection, with his consent, to have the protection which the permit affords against punishment. The permit originates in the necessity of a vigilant police—its object is, primarily, protection against the penalties of the patrol laws; which laws, however necessarily stringent, operate humanely and beneficially for the slave, as well as the master, and the whole body of the community. Such, and no more, are the offices of a *general pass*. In this case, and in no analogous case, does it shield the company, or

any other person or persons, occupying their position relatively to the slave, from liability, if injury accrues to him. I dismiss, therefore, so much of the instruction as relates to the *general pass*, with this remark, that it will be seen, from the whole drift of this decision, that neither rail road companies, nor any other person, will be safe in the transportation of slaves, without a specific written authority from the owner, or his consent, so in some other way manifested, as that it will be susceptible of proof.

[2.] Disencumbered, then, of all considerations which grow out of the pass in this case, the legal proposition asserted by the learned Judge, presiding on the Circuit Bench, is this, to wit: "If a company take the slave of another on board their cars, without the knowledge and consent of the owner, and he be injured, by negligence or otherwise, the company will be liable to respond in damages for the injury." The instruction given must be understood in the light of the facts of the case made in the record. It is in evidence, that this company received this slave, to transport him, for a *compensation* taken from him. This fact is an important one in this case. When, therefore, the Judge speaks of a company taking a negro on their cars, he means taking him, as the company did in this case, to be transported for their benefit, in the receipt of the customary fare for such transportation.

Again, the taking, by the charge, must be not alone without the *knowledge* of the owner, but also without the *consent* of the owner. If he had ruled, that the company would be liable if they took the negro singly without the *knowledge* of the owner, the inference would be a fair one that, with his knowledge, they would not be liable, and that is not necessarily always true in law. We understand the Judge to say, that in order that the company shall be protected, the owner must both know and consent to the taking. He could not consent without knowledge, but he might know without consenting. In the case put, as thus understood, the Court holds that the company is liable, whether the injury result from the negligence of the company, or otherwise; that is to say, they are liable, wholly irrespective of the question of negligence, and thus we arrive at the true *status* of the point for review.

I do not consider that the decision of this question depends upon any new principles. We have determined it upon principles of the *Common Law*, long settled and familiar to the juris-

prudence of Great Britain and of our own States. The interest of the question springs out of the application of those principles to a class of statutory persons, to wit: *rail road corporations*, unknown to the Courts of either country until within a very recent period, and to a class of subjects (negro slaves) not recognised as property in England, and peculiar here, in this, that whilst they are in fact property, under our laws, they are sentient, reasoning human agents. In its practical consequences, the judgment we now render is an important one.

The effort of the able counsel for the plaintiffs in error, (Mr. Poe,) was, first to establish that this is a case of bailment, and thus make the plaintiffs in error liable only for negligence; and particularly, that it belongs to the class designated as *mandates*; and more particularly still, that it falls within that class of *mandates* which arises under what is called the *quasi contract of negotiorum gestor*—where, for example, “a party spontaneously, and without the knowledge or consent of the owner, intermeddles with his property, as to do work on it, or to carry it to another place.” *Story on Bailment*, §189. If this be a bailment at all, it must belong to this class. By the evidence, there was no contract between the owner, Mr. Holt, and the rail road company. All bailments, except *mandates of the negotiorum gestor* class, are founded in contract, express or implied. As, then, there was in this case confessedly no contract, but a taking of the slave, spontaneously, without the knowledge or consent of the owner, it must belong to that class or none. In cases of this sort, (of the *negotiorum gestor* sort,) as the mandatory acts wholly without authority, there can be, strictly speaking, no contract. *Story on Bailment*, §189. A *quasi mandate* is raised by implication, and that for the benefit, not of the mandatory, but of the owner. The intermeddler is left to all the liabilities of his act, whatever the circumstances of the case may make them, whilst the owner of the property is allowed, at his election, to treat the transaction as a contract of *mandate* or otherwise, according as his interest may require or suggest. This appears to be the footing upon which the Roman law places this species of mandate. *Polhier's Appendice du Quasi Contrat. Negot. Gest. Appendice Contrat de Mandat*, n. 167. *Story on Bailm.* §189. It does not seem to be fully recognized by the Common Law. The English Courts appear only to have invoked the principle of implication, for the

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benefit of the owner, in a few instances: As, where there has been a subsequent ratification of the acts of the *gestor* by the owner; and sometimes where unauthorized acts are done, positive presumptions are made, by law, for the benefit of particular parties. Thus, if a stranger enters upon the lands of an infant and takes the profits, the law will, in many cases, oblige him to account to the minor for the profits, as his bailiff; for it will be presumed, that he entered to take them in trust for the infant. 1 *Dane's Ab. ch. 8, art. 2, §10.* 1 *Bac. Ab. Account. Coke Litt. 89 b. 90 a. Story on Bailment, p. 205.* Actions on mandates are very uncommon in our Courts, for the reason, not flattering to human nature, given by Sir Wm. Jones, that it is very uncommon for men to undertake any office of trouble without compensation. *Jones on Bailment, 57.*

The rule of liability of the *negotiorum gestor*, varies according to his character and employment, and the circumstances attending the transaction. Suffice it to say, that he is not, in general, liable, without negligence, and if so, the case before us being held to belong to the class of the *negotiorum gestor*, the instruction of the Court below would be erroneous. In Louisiana, it has been held, that if one spontaneously and gratuitously take the slave of another, without his knowledge or consent, and the slave escape and is lost to the owner, such an one will not be liable, unless there was gross negligence on his part. *Bayou vs. Prevot, 4 Martin's R. 65. Code of Louisiana, articles 2274, 2275. Story on Bailment, §§217, 577.* See, also, *DeFouclair vs. Shottenkirk, 3 Johns. R. 170. Beverly vs. Brooke, 2 Wheat. R. 100.*

The question remains, Is the case at this bar a mandate of this class? Demonstrably it is not, and for one obvious and satisfactory reason: A necessary element in every *mandate*, and particularly in this, is that the taking of the property be *gratuitous*. If the receiving of Mr. Holt's slave on their cars, by the plaintiffs in error, had been by his consent and authority, then it would have been a familiar and very intelligible bailment, subject to the government of settled legal principles. But that is not this case. If they had taken him *gratuitously*, without the knowledge or consent of Mr. Holt—in that event, under certain circumstances, the case would belong to the class of mandates I have been considering. But they did not so take him; but, on the contrary, they received him to transport to the eight mile post, above Ma-

con, for their *profit and advantage*. One of the witnesses testifies, that they received from the negro twenty-five cents, to carry him to that point. The transportation of the slave was not a charity—it was not gratuitous—it was not for the mutual benefit of themselves and the owner; for he neither assented to nor knew of the transportation. It is true, that it was an accommodation to the slave, and it was done at his instance; but I need scarcely remark, that the slave could make no contract to bind his master, or in any way make him a party to the transaction, without his consent. The slave must be considered in the light of property, and in no other. There are cases where the intellectual and moral character of the slave does modify the general law of bailments, as we shall see, but this is not one of them. All mandates are gratuitous. "The contract (says Mr. Story) must be gratuitous, and this is of the very essence of the contract; for if any compensation is to be paid, it passes into another contract; that is to say, the contract of hire." *Mandatum, nisi gratuitum, nullum est. Story on Bailment, §153. Dig. Lib. 17, tit. 1, l. 1, §4. Pothier's Pand. lib. 17, tit. 1, n. 15. Pothier's Contrat de Mandat, n. 22.* It does not vary the matter, that the mandate of the *negotiorum gestor* is without a contract. In that case, as in other mandates, the law goes upon the idea of the mandatory acting without profit to himself; but I trust I shall show, aside from all these views, that the law gives to this transaction a definite character, and that that character is wholly inconsistent with the idea of a bailment of any kind. The opinion of Lord *Ellenborough*, in a case supposed by him, in *Drake vs. Shorter*, (4 *Esp. R.* 165,) was strongly relied upon by counsel for the plaintiffs in error. The case supposed was this: A chattel, as a boat, belonging to another person, is taken to do an act of kindness to the owner, as to save other property belonging to him from the flames, and an unintentional injury happens to the boat, in the use of it for that purpose. In that case, Lord *Ellenborough's* opinion was, that the person taking the boat would not be, in any manner, responsible for it to the owner. It was insisted, that this case is analogous to the case put by his Lordship, in this; that the taking of the slave Jacob, to carry him home, was an act of kindness to his master—it facilitated his return, and promoted the interest of the owner. The result was very different; for in fact, as a consequence of the slave going on board the *cars*, he lost his limb, and his value

was greatly depreciated. The owner was in fact injured. But the analogy is not perceived. The case put by Lord *Ellenborough*, goes upon the ground of a mere kindness—a charity to the owner—wholly irrespective of the interest of the person taking the boat. In this case, the taking of the slave was *alone* for the interest of the company. The fact of receiving pay for his transportation, conclusively negatives the idea of a kindness, or mere charity to man or master.

If a slave be taken on board the cars, by a rail road company, or be taken by any other carrier, to be conveyed solely in consequence of his distress, and from motives of humanity alone, no reward, hire or freight being to be paid for his passage, the carrier would, in such case, be responsible only for gross neglect. This, I have no doubt, would be the rule in that case; and it was so laid down by Chief Justice Marshall, in *Boyce vs. Anderson*, 2 *Peters*, 150. This, however, is not such a case, and the rule is not applicable.

The decision of the Supreme Court, in the case just referred to, was relied upon as controverting this case. In that case, certain slaves being wrecked on the shore of the Mississippi river, and being in the custody of the agent of the owner, were, at his instance, taken on board the yawl of the steamer Washington, being then in the stream, to be transferred to the steamer, for transportation. In their passage to the steamer, the yawl was upset, and the slaves were drowned. The owner brought an action against the owners of the Washington, for the value of the slaves. The general rule is, that *common carriers* are insurers of the goods bailed to them, and are liable, except for inevitable accidents—that is, the acts of God or the King's enemies. 2 *Kelly*, 352. The Supreme Court determined that this severe rule of the Common Law does not apply to slaves. "A slave, (said Judge Marshall, in delivering the opinion of the Court,) has volition and feelings, which cannot be disregarded. These properties cannot be overlooked, in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid this proceeding, but it might endanger his life or health. Consequently, this rigorous mode of proceeding cannot be adopted, unless stipulated for, by special contract. Being left at liberty, he may escape. The carrier has not, and cannot have, the same absolute control over him, that he has over inanimate

matter. In the nature of things, and in his character, he resembles a passenger, not a package of goods. It seems reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods." Upon this just and humane reasoning, the Supreme Court decided, that carriers of slaves, in the absence of any special contract to the contrary, are liable for injuries done to them, only in the event of their being caused by negligence or unskilfulness. 2 *Peters' R.* 150. *Stokes vs. Saltonstall*, 13 *Peters*, 181, 192. *Story on Bailm.* §577. *Williams vs. Taylor*, 4 *Porter's R.* 234, 238. 4 *McCord*, 223. Were such a case before me, I would unhesitatingly decide in accordance with the rule held by the Supreme Court. It is very apparent, however, that this case is distinguishable from the case before the Supreme Court. That was a contract of bailment, between the owner of the slaves, by his agent, and the Captain of the steamer Washington—the usual case of a contract for carriage, for hire. In this case, there was no contract—the owner neither assenting to, nor having knowledge of, the taking of his slave, by the plaintiffs in error, on board their cars. It has, therefore, no relevancy to this case.

From what has been said, the character of this transaction is already necessarily inferable. The absence of knowledge and consent, on the part of the owner, Mr. Holt, precludes all idea of contract, express or implied; and the fact that the company received pay for the transportation, denies to it the character of a gratuitous or charitable mandate. It does not belong to the Law of Bailment. These two things designate it, unequivocally, as a *tort*. The company converted the slave to their use, for profit—they are *tortfeasors*, and liable as such; that is to say, they are liable for all injuries, whether they result from negligence or otherwise; and if so, the instruction given by Judge Floyd to the Jury, was according to the law of the case. If there was a conversion of this slave, the whole matter is demonstrated; and really, this seems to be so obvious, that it scarcely needs reasoning or authority. That which is not property cannot be converted. Slaves are property; and the negro race in this State are generally slaves, but not universally. Knowledge, therefore, that this negro was a slave, was necessary to make the taking a *tort*.

[3.] The black color of the African race is presumptive evi-

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dence of slavery. 19 *Martin's Law R.* 648. *Fox vs. Lambston*, 3 *Halst.* 275. *Glober vs. Glober*, 2 *Hayw.* 170. *Burke vs. Joe*, 6 *Gill. & John.* 136. *Nelson vs. Wetmore*, 1 *Richardson*, 218. If this were not the rule, it is in proof, from the pass, that the negro was a slave, and that the company knew it. It was insisted, in the argument, that there was no intention, on the part of the company, to injure the owner—no unlawful or wilful purpose—and therefore, this could not be a *tort*—it could not amount to a conversion. As a matter of fact, this is conceded. The high character of the company forbids (and so do the facts,) any other conclusion. But if the act was unlawful—if it was in derogation of the right of property in the owner—if there was an appropriation of the property of the defendant to their own use—it was a conversion, irrespective of any intent to injure him. Even dominion over property, without use, is conversion. *User* of property, without the consent of the owner, is conversion. These are elementary propositions. If A take the horse of B, and ride him, it is a conversion, even although A afterwards deliver him; and trover will lie, and the delivery will go in mitigation of damages. So, if the Macon and Western R. R. Co. take the slave of Mr. Holt, and use him, it is a conversion, although they subsequently return him; and an action for damages will lie, and the return of the slave will go in mitigation of damages. This simple statement illustrates and fixes the character of this transaction. Was there, in this case, an *user* of the slave? Did the company appropriate him to their use? Suppose that, finding this slave at large on the highway, with a general pass, they had put him to work in an excavation on their road—can it be doubted but, in that case, there would be a user of the slave? And suppose that, whilst thus engaged, by a slide of the embankment, the slave should lose his life—can it be questioned, that the company would be liable for his entire value? It has been so held by this Court. In the case of *The City of Columbus vs. Mrs. Howard*, a slave was hired for general purposes, by the City, and put to work in excavating a dangerous embankment, and whilst so at work, lost his life, by the falling in of the earth. We held them liable, and upon the principle, that such service being *outside the contract of hire*, was a conversion—a *tort*. *The Mayor and Council of the City of Columbus vs. Howard*, 6 *Ga. Rep.* 219. *Story on Bailment*, §413. 1 *Cow.* 322. 2 *Lord Raymond*, 915. 12 *Pick.* 492.

5 Mass. 104. The principle is the same in both cases—in neither, was there any contract—in both, there was a conversion. Or, suppose that the Central Rail Road Company, finding a slave at the Oconee river, with a general pass, should put him to work for an hour, or a day, upon the bridge over that stream, and, after completing the work assigned him, in getting off from the bridge, he should accidentally fall into the river and perish, it is clear that the user would be a conversion, and the company would be liable. Now, how, in principle, does this case differ from those supposed? It is true, that the plaintiffs in error did not put the slave to do work of any kind; but they, in the line of their business, as carriers, did receive and appropriate the body of the slave, for the purpose of a profit to themselves. They used him for that purpose. If, instead of a living man, they had taken, for any incidental advantage to themselves, a bag of cotton belonging to the defendant, without his consent, and it had been destroyed or damaged by fire, they would be held to have used it, and would be liable. More directly to the point—if a ship owner should take the heavy goods of another, (iron, if you please,) without his consent, for the purpose of ballast, with a view of transporting it to a point where the owner desired it to be transferred, and it should be lost by the sinking of the ship, it would be a conversion—an user. The advantage, in that case, would spring out of the iron subserving the useful, perhaps necessary purpose of ballast; in this case, the advantage springs out of the slave—he subserving the purpose of putting into their pockets the usual amount of fare. The increased risk, growing out of the reasoning, willing powers, of a living human creature, does not affect the principle. Cognizant of these properties in the chattel, they take the risk. For the purposes, however, of this argument, and, indeed, upon all the legal principles involved, we can consider the slave in no other light than as a bale of goods. I repeat, that the absence of any intention to do a wrong to the owner, does not change the legal character of the act—it is a conversion without that; and to this point, see *Willes' R.* 577, and *Nelson vs. Wetmore*, 1 *Richardson's R.* 322. The case of *Nelson vs. Wetmore*, decided by the Supreme Court of South Carolina, is very much in point, and sustains fully the view of this case, which I have presented. Wetmore, meeting with Nelson's slave—who had runaway from his master—as he traveled in

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the stage to Washington City, from motives of benevolence, as it would seem, received him in the capacity of a servant, and passed him off on the road as such, paying a part of his expenses, and procuring his passage at servants' rate. At the City of Washington, he parted with the slave, who made his way North, and was lost to his owner. The action of trover was brought against him for the negro, with counts for damages. The Supreme Court of South Carolina sustained the trover count, upon proof of conversion, substantially as stated above, and ordered a new trial, alone upon the ground, that, inasmuch as the slave was a mulatto, and therefore, did not furnish, in his color, *prima facie* evidence of being a slave, and passed himself as free, it ought to be left to a Jury to determine whether the defendant, *Mr. Wetmore*, regarded him as free or as a slave. Of course, the action of trover was sustained, upon the ground that the acts of the defendant, upon the assumption that he knew the man was a slave, were tortious. *Nelson vs. Wetmore, supra*. The case of *Mrs. Harris vs. Mabry*, decided by the Supreme Court of North Carolina, settles the same principle. The defendant and others, were owners of the Piedmont line of stages, and, by their agent, took the female slave of the plaintiff, without her consent, as a passenger, and transported her out of the State; and an action was brought against them for damages. The Circuit Judge who tried the case, instructed the Jury, "that it is a principle of law, that when one person caused damage to another, by an act which he had no right to do, he was responsible for the injury; and in this case, the defendant *had no right to carry off the slave of the plaintiff, in the stage, without her permission*." The case was taken up, and the Supreme Court affirmed the decision of the Court below, saying, "on this point, the Judge charged the Jury, that the plaintiff had a right to expect full compensation for all the injury sustained by the wrongful acts of the servants of the defendant, in doing his business, and to be placed in the same situation she would have been in, if the defendant's agents had not interfered; that the plaintiff had a right to recover all such damages as could properly be considered the consequence of the acts of the defendant's agents, while in his service. We see nothing erroneous in this charge, &c." 1 *Iredell's Law Rep.* 240.

These principles do not apply alone to rail road companies and stage contractors, but are of general application. They are

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not now, but are laid up among the settled doctrines of the Common Law. See, generally, *Countess of Rutland's case*, T. 38 *Eliz. B. R.* 1 *Roll. Abr.* 5 (L.) pl. 1. 2 *Wheat. Selwyn*, 1390. 6 *Mod.* 212. 4 *Term Rep.* 260. 6 *East.* 538. 6 *Bac. Ab.* 677. 7 *Johns. R.* 254. *Willes*, 577. 1 *Richardson's R.* 321.* 1 *Iredell's Law R.* 242. 5 *Mass. R.* 104. 3 *B. & Ald.* 685. 12 *Pick. R.* 136. 2 *Starkie's N. P. C.* 306. 7 *Bingh. R.* 298.

Let the judgment of the Court below be affirmed.

No. 28.—JAMES DEAN, plaintiff in error, vs. WILLIAM TRAYLOR, defendant in error.

[1.] To entitle the vendee to recover damages of the vendor, for a breach of warranty of soundness, in the sale of negro children, whose mother was proven to have died of consumption, it is necessary to shew, either that the disease was hereditary in the family, or that the children were born subsequent to the actual existence of the complaint in the mother.

Assumpsit, on appeal from Bibb Superior Court. Decision made by Judge FLOYD, at July Term, 1849.

James Dean, on 31st May, 1847, sold, with warranty, to Wm. Traylor, the negro Sofa, and her three children, for \$1350. On the 23d of April, 1848, Sofa died of consumption; the opinion of physicians was unhesitating, that the disease was consumption, and that she was "diseased in that way, previous to 31st May, 1847"—though one witness, the agent of Dean, and who brought the slave to Georgia, and who was not a physician, testified that Sofa was sound, and had no cough, or other symptoms of consumption, when Dean sold her.

The plaintiff below declared for damages, not only for the unsoundness and loss of Sofa, but for the unsoundness of the children. The proof on this point was, that "the disease is hereditary, and, of course, the children cannot be as valuable as if born of a healthy mother, and are worth all or more than a third less."

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In another set of answers, same witness values the children at half price, on said account. Another witness thinks two of the children have "consumptive marks about them—though it does not necessarily follow, that children will have consumption because the mother has it."

It was proved that Sofa was sold, by Dean, for \$600.

On the trial, defendant's counsel objected to so much of the declaration as sought damages for the alleged liability of the children to said disease—it not being alleged that they were then unsound—and to any evidence being given on this point; which was overruled. The charge of the Court was also excepted to, which will be known by the exceptions. The Court's charge is not recited in bill of exceptions; but it appears that defendant below asked the Court to charge that, under the evidence, the Jury could not find any damages on account of any supposed unsoundness of the children—which the Court refused to do.

Under the charge of the Court, as to the rule and measure of damages, it was admitted by both sides, that about \$150 of the finding was on account of the children. The finding was for plaintiff—\$750, with costs.

A new trial was moved for, on the foregoing grounds, taken during the trial, and also, because the verdict was claimed to be contrary to law and evidence. Motion overruled.

MCDONALD and POWERS & WHITTLE, for plaintiff in error.

POE & NISBET, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] This was an action of *assumpsit*, for the breach of a warranty of the soundness of four slaves—Sofa and her three children—in this: that the mother was laboring under consumption at the time of the sale, and that the offspring had partaken of the same disease, by inheritance. A verdict of \$750 having been rendered for the plaintiff, a new trial was moved for, on the ground, that the finding of the Jury was contrary to law and evidence; and it is for the refusal of the Court to grant this application, that this writ of error is prosecuted.

We have scrutinized the testimony thoroughly, and are satisfied

that the verdict, as to the woman, was justified by the proof; but we think it wholly insufficient as to the children.

We do not doubt that pulmonary consumption is an hereditary disease; in other words, that the *tuberculous* constitution is transmitted from parent to child, is a fact not to be controverted. Indeed, it may be regarded as one of the best established points in the etiology of disease. I am aware that, in the medical world, there are two parties, holding diametrically opposite opinions upon this subject—one maintaining that the disease is always hereditary and never acquired; the other, that no diseases are hereditary, but that they are always the result of circumstances, which come into action after birth; but in this, as in every thing else, truth, I apprehend, will be found in the middle ground, between these two extremes. How far consumption, cancer, insanity, or any other diseases, in the parent, will probably re-produce themselves in the offspring, is not very satisfactorily ascertained. The most moderate calculation is, that in children subjected after birth to similar circumstances, the hereditary influence does not appear to be exerted beyond 4 per cent. The most eminent physicians entertain no doubt that hereditary disease may fail to appear in one generation, and afterwards develop itself in a succeeding generation. This, they say, has frequently happened; and such, I believe, is the common observation upon this subject. Even family likenesses and peculiarities, transmitted through many generations, are matters of daily occurrence and remark. I deem it altogether useless to spend more time in establishing a physiological fact, which appears to have passed into a proverb among the Jews, as early, at least, as the days of Ezekiel, the prophet—"The fathers have eaten sour grapes; and the children's teeth are set on edge."

Without trespassing further, then, upon territory belonging more appropriately to another profession, and assuming that this disease is transmissible by natural generation, still, we think the evidence, as to the children, was defective in this: it neither appeared from the testimony, that the children were born *subsequent* to the development of the disease in the mother, or that consumption was an *ancestral* disease in the family, either on the maternal or the paternal side. And one of these facts should have been proven, to warrant a recovery; for it is clear, that if the disease in the woman was not hereditary, but produced in her by expo-

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sure, or any other *supervening* cause, then the offspring born prior to that period, could not have derived the taint from their mother.

The Jury, in assessing the damages, we gather from the record, as well as the admissions of counsel in the argument, seem to have taken the price of the woman, \$600, and added to it \$150 on account of the children. So far as the woman is concerned, we are willing that the verdict should stand; and acting under the ample powers conferred upon this Court, by the Statute creating it, of "awarding such order and direction in the premises, as may be consistent with the law and justice of the case," we shall remand this cause, with the following instructions, to-wit:

That there was error in the Superior Court, in the finding of the Jury, in reference to the children of the woman Sofa—the evidence being wholly insufficient to sustain the recovery on account of the alleged unsoundness in them; and that, so far, the judgment of said Court be reversed, in refusing a new trial; and that a new trial be had in this case, unless the plaintiff shall remit all of said verdict except the sum of \$600, with interest thereon from its date, and the cost of the case below, with liberty to strike out of the declaration so much thereof as relates to the children of Sofa. It is further directed, that the cost incurred in this Court, be paid by the defendant in error.

It is better for both parties—*vendor* and *vendee*—that further time be allowed, to test the existence of the disease in the children—the testimony going merely to establish the symptoms or predisposition to consumption, rather than the actual complaint itself. If they have it, and derived it from their mother, \$150 will not compensate for the injury. The opinions, on the other hand, of the highly respectable and intelligent physicians who were examined on the trial, may turn out to be erroneous; and in that event, the seller should be relieved altogether from any liability on account of the children.

No. 29.—JUDGE, a slave, plaintiff in error, vs. THE STATE OF GEORGIA, defendant.

- [1.] When a Jury have been regularly drawn and summoned for the trial of a slave, charged with a capital offence, according to the Statutes of this State, such slave is entitled to be tried by such Jury, and the Justices of the Inferior Court have not the right, capriciously to discharge such Jury, without some good and legal cause, and summon any other Jury for the trial of such slave.
- [2.] It is no objection to a Juror drawn and summoned for the trial of a slave, who appeared and answered to his name, that the summons was left at his residence, and not served on him personally.
- [3.] It is no objection to a Juror, because there was a mistake as to his *middle* name; who, on the name of Jesse McClay Evans being called, appeared and answered, and said that his name was Jesse McKinnie Evans—the mistake was properly corrected and the Juror impannelled.
- [4.] On the trial of a slave, under the Statutes of this State, for a capital offence, the warrant and the preliminary proceedings had before the committing-Magistrates, alleged in the indictment, ought to be given in evidence on the trial, so as to show that the Justices of the Inferior Court properly had jurisdiction of the offence with which the slave is charged.
- [5.] Upon the trial of a slave for a capital offence, when the evidence on the part of the prosecution has closed, and the cause submitted to the Jury on both sides, further evidence cannot be admitted in behalf of the prosecution against the defendant.

Certiorari, from a Special Term of the Inferior Court of Houston County. Trial and decision had and made 30th of July, 1849. *Certiorari* refused by Judge FLOYD, September, 1849.

A slave, named Judge, the property of Robert Freeman, was charged with, tried, convicted and sentenced for the crime of murder. On the trial, prisoner's counsel objected—

1st. To the array, because a former Jury had been regularly drawn and summoned to try said negro, on the same charge, which Jury had been discharged, (and, so far as now *appears*, capriciously discharged.)

2d. Because the Sheriff by his return on the *venire*, showed that he had legally served only twenty-three instead of twenty-four Jurors—one Juror having been served by a subpoena left at his residence instead of personally, and the Sheriff was then allowed to correct his return, and call said Juror served.

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3d. Because Jesse McKinnie Evans appeared and answered, when the name of Jesse McClay Evans was called—he stating that there was a mistake as to his name.

4th. After State's counsel had said he closed for the present, and prisoner's called on to proceed, and declined introducing any evidence, and the case thus submitted to the Jury, prisoner's counsel asked the Court to charge the Jury, that they must acquit the prisoner, because the warrant and other preliminary proceedings before the Magistrates, had not been offered in evidence to support the allegations in the indictment; which also was refused, and the State allowed then to introduce said evidence; and after lawful notice of the intended application for *certiorari*, it was applied for, and refused, as above stated.

GILES and POWERS & WHITTLE, for plaintiff in error, cited the following authorities—

Prince's Digest, 791, 793. *Joy on Conf. and Challenge*, 180. 3 *Black. Com.* 355. 2 *Coke on Lit.* 218. *Starkie on Ev.* *Arbousin vs. Willoughby*, 1 *Marshall*, 477, (4 *E. C. L. R.* 348.) *Lindsay vs. Wells*, 3 *Bingh. N. C.* 777, (32 *E. C. L. R.* 327.) *Coles vs. Green*, 1 *Bingh.* 426, (8 *E. C. L. R.* 36.) *Mary vs. The State*, 5 *Miss.* 71. *Drake vs. Boyce, Riley*, 222. *Brown vs. Giles*, 1 *Carr. & P.* 118, (11 *E. C. L. R.* 337.) *Rez vs. Bazely*, 19 *E. C. L. R.* 353. *Rez vs. Hilditch*, 5 *Car. & Pay.* 299, (24 *E. C. L. R.* 330.) *Rez vs. Stimpson*, 2 *Car. & Payne*, 415, (12 *E. C. L. R.* 197.)

ROGERS, for defendant, cited—

Prince's Digest, 769 to 793. 1 *Chit. Crim. Law*, 299, 300, 511, 512, 556. *Stark. Crim. Pl.* 331, 332, 290, 291, 273 to 275. 2 *Mass. R.* 172, 173. 1 *Wheeler's Cr. Cases*, 222. 2 *Id.* 96 to 101. *Graham on New Trials*, 24 to 30. 5 *John. R.* 83, '4. 3 *Peters*, 6. 14 *Id.* 327. *Bacon's Abr. Minomer, a.* 2 *Russell on Crimes*, 705. 1 *Phil. Ev.* 167.

By the Court.—WARREN, J. delivering the opinion.

The error assigned to the decision of the presiding Judge of the Court below is, the refusal to sanction a *certiorari*, presented

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in-behalf of the negro slave, Judge, who had been tried for the offence of murder, before the Justices of the Inferior Court of Houston County, and found guilty.

There are several grounds stated in the petition for *certiorari*, which appear to be sustained by the bill of exceptions signed by the Justices of the Inferior Court.

[1.] The first ground taken in the *certiorari* is, that the Inferior Court discharged the first panel of the Jury drawn to try the slave.

It appears that a Jury was *regularly* drawn and *summoned* for the trial of the slave, for the offence of murder. The 8th section of the Act of 1811, required the Justices of the Inferior Court to draw a Jury for the trial of slaves, at their *regular* terms. *Prince*, 790. The Act of 1811 was amended by the Act of 1816, which authorizes a majority of the Justices of the Inferior Court forthwith to draw a Jury, after being notified of the commitment of a slave charged with a capital offence, of not more than thirty-six, nor less than twenty-six Jurors. *Prince*, 792.

According to that part of the 8th section of the Act of 1811, which was not repealed by the Act of 1816, twenty-four of the Jurors so drawn and summoned, according to the Act of 1816, are to be impanelled for the trial of such slave. The 9th section of the Act of 1811 declares, that the owner or manager of the slave, shall have the right of challenging seven of said number, (that is, of the twenty-four,) and the said Court five on the part of the State, and the *remaining twelve shall proceed to the trial of such slave*. *Prince*, 791.

The construction which we give to the Act of 1816 is, that it was not intended to alter the number, twenty-four, which was to constitute the panel out of which the Jury were to be selected for the trial of the slave, as provided by the 8th section of the Act of 1811. The Act of 1816 requires not less than twenty-six Jurors to be drawn and summoned—twenty-four of whom will constitute a legal panel for the trial of the slave.

It appears a Jury had been *regularly* drawn and *summoned* for the trial of the slave Judge, and were discharged by the Court without any cause, so far as the record discloses. Without some good and legal cause shown, the slave was entitled, under the law, to have been tried by a Jury, to be selected out of the twenty-four impanelled, out of the twenty-six so regularly drawn and

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summoned for that purpose. The 9th section declares, that after the owner or manager of the slave, and the Court, shall have exercised the right of challenge given to them respectively, the remaining twelve of the Jury *shall proceed to the trial of such slave.*

[2.] The second ground is, that only twenty-three of the twenty-six Jurors drawn, were duly summoned to attend the Court; that one of the Jurors, (Wimberly,) was summoned by leaving the subpoena at his *residence*. The Juror, however, appeared, and whatever excuse the ~~want~~ of *personal service* might afford the Juror, if proceeded against for non-attendance, it cannot avail the prisoner as an objection to his competency.

[3.] The third ground taken in the *certiorari* is, that when the names of the Jurors were called over by the Clerk, he called the name of Jesse McClay Evans, when Jesse McKinnie Evans appeared and answered, and said there was a *mistake* in his name. The middle name of the Juror was properly corrected, and he was rightly impannelled as a Juror.

The fourth ground of error alleged in the *certiorari* is, that after the evidence was closed on the part of the prosecution, and the cause was submitted to the Jury on *both sides*, the counsel for the prisoner then asked the Court to instruct the Jury, that they must find the prisoner not guilty, on the ground that the proceedings had before the committing Magistrates had not been given in evidence to the Jury, nor any of them, which instruction the Court refused to give, but, on motion of the counsel for the prosecution, the Court allowed the warrant and all the other preliminary proceedings set forth in the indictment, to be read in evidence to the Jury.

[4.] The warrant and the proceedings had before the committing Magistrates, as alleged in the indictment, ought to have been given in evidence on the trial of the slave, so as to have shown that the Justices of the Inferior Court had *jurisdiction* to try the slave for the *alleged offence*. See the Act of 1811; *Prince*, 789, 790; also, the 1st section of the Act of 1821, *Prince*, 790. A slave cannot, under the laws of this State, be put upon his trial for a *capital offence*, before the Justices of the Inferior Court, until he has been first brought before three Magistrates, and after an investigation had before them, they shall determine that the crime with which such slave is charged, is one for which he, she

or they ought to suffer death, then to be committed by the Magistrates, and the Justices of the Inferior Court notified thereof, who take jurisdiction of the offence. These preliminary proceedings before the Magistrates, under the Statutes of this State, before a slave can be put upon his trial for a capital offence before the Justices of the Inferior Court, would seem to be as indispensably necessary, as that a free white person should have an accusation for a capital, or other infamous crime, preferred against him by the presentment or indictment of a Grand Jury. In the case of a slave, the accusation is first made before the Magistrates of the County in which the crime was committed, before he is put upon his trial for a capital offence. In the case of a free white person, the accusation is made by a Grand Jury of the County in which the offence was committed.

[5.] We are not aware of any rule or practice, on the trials of criminal causes, which would authorize the prosecution to introduce evidence against the defendant, after the cause has been submitted to the Jury, on both sides. Such a proceeding, it is believed, is unprecedented in the trial of criminal causes in this State, and from the case of *Brown vs. Giles*, (11 Eng. Com. Law Rep. 337,) it would seem to be contrary to the practice in England. Such a practice would operate as a surprise on the defendant, whose witnesses would be dismissed when the testimony closed, and he would, in all probability, regulate his testimony by that of the prosecution, to say nothing of the danger of perjury, when a material fact was to be supplied, to make out the offence charged in the indictment. It is true, there would be no danger of perjury in this case, because the evidence was in writing; but if one species of evidence may be admitted after the prosecution have closed their testimony, any other may, with equal propriety, be admitted. In this case the defendant introduced no testimony. We are, therefore, of the opinion, that the *certiorari* ought to have been sanctioned on the first and fourth grounds taken therein, and it is so adjudged by this Court.

Let the judgment of the Court below be reversed.

No. 30.—JAMES MONTGOMERY, administrator, *de bonis non*, of
REUBEN B. DAVIES, deceased, plaintiff in error, vs. JOHN
EVANS, defendant in error.

- [1.] A, as the agent of B, deposits a sum of money with C, with request that he will keep it until B returns home, (he being absent from the State,) and then pay it to him—which C agrees to do: *Held*, that C is a depository, and not liable to be sued by B for the money, until after a request.
- [2.] Where a request is a condition precedent to liability, it must be specially averred in the declaration, with time and place, and by whom and on whom made. It must be so set forth, as that the Court may judge whether it is made according to the contract.
- [3.] In an action by B against C, for the money deposited with C by A, as the agent of B: *Held*, that A is not a competent witness for the plaintiff, to prove the liability of C.
- [4.] It is error in the Court, to instruct the Jury in relation to a matter of fact, about which there is no evidence,

Assumpsit, &c. in Crawford Superior Court. Tried before
Judge FLOYD, August Term, 1849.

This was an action brought by John Evans against Montgomery, as the administrator of Reuben B. Davies, to recover one hundred and fifty-seven dollars, deposited by Elijah Evans, as alleged, with the intestate during his life, for the use of John Evans.

The plaintiff first proved by John Evans, Sr. that he was present when the money was deposited for John Evans, who was then in Mississippi. Plaintiff then offered the testimony of Elijah Evans, taken by commission, who swore that he, as the agent of John Evans, deposited the money with Davies, for Evans.

Defendant's counsel objected to this evidence, on the ground, that as agent, he was liable for the money to John Evans, and "was interested in shifting the burden from himself, and placing it on defendant."

The Court overruled the objection—and this is the first decision complained of.

The defendant then objected to the following interrogatory, as being leading and irrelevant:

"Look at the annexed account, and say if it was made out by

you—and if yea, how came you to make out your account, and prove it in your own name? Were you, or not, acting as the agent of John Evans—and were you not told that the account should be made out in that way—and was it not so done through mistake?”

The account referred to was made out for the same money, as due to Elijah Evans.

In answer to this interrogatory, the witness stated he made out the account thus by the advice of defendant.

The Court overruled this objection—and this decision is alleged as error.

Other evidence was introduced, to prove the same facts, as already stated.

Defendant then moved to dismiss the case, on the ground, that no demand was proven to have been made on the intestate or his representative. Elijah Evans, the witness, had demanded the money as his own—at least, he had sworn to it in an account, as due to himself, and ordered suit if not paid; and said suit was brought, and then dismissed by plaintiff. The Court overruled this motion, and defendant excepted.

The Court charged the Jury, that it was necessary for plaintiff to prove a demand, in order to recover; and they might look into the testimony to ascertain if this fact was proven—to which charge, defendant excepted, on the ground, that no such evidence had been before the Jury.

The defendant moved for a new trial, on the several grounds of error alleged; and farther, because the verdict was contrary to the evidence. The Court overruled this motion, and defendant excepted.

And on these several exceptions, error is assigned.

HALL and GREENE, for plaintiff in error, cited—

Nisbet vs. Lawson, 1 Kelly, 282, 283. *Sage vs. Sherman*, 25 Wend. 426. *Story on Agency*, §§218, 247. 1 Greenl. §51. 1 Chitty, 244, '5, 285. *Story on Bailment*, §§107, 103, 105. *Paschal vs. Davis*, 3 Kelly, 256. *Graham on New Trials*, 278, 262, 362, 326, 237, 271.

HUMPHREY, for defendant in error, cited—

Chitty on Contracts, 231, (and note 1,) 733. 6 *Ga. Rep.* 365, 212, 276, 324. 1 *Kelly*, 392, 590. 4 *McCord*, 412. *Graham on New Trials*, 284.

By the Court.—NISEBET, J. delivering the opinion.

[1.] The counsel for the defendant moved on the trial, that the plaintiff be non-suited, because there is no allegation in the declaration, that a demand had been made on the defendant's intestate or his representatives, after his death, of the money sued for. Whether such averment was necessary, depends upon the question, whether the defendant is liable without such demand. If he is not—if the demand is a condition precedent to his liability—I apprehend it will be conceded that the averment was indispensable. To determine this question, we must look to the character of the deposit out of which the action grew. By two of the witnesses, it is proven that Elijah Evans, as the agent of John Evans, delivered to R. B. Davies, in his lifetime, from \$150 to \$160, for John Evans. The testimony most favorable to the plaintiff, is that of the witness, Montgomery; and I take his evidence as determining the character of the transaction. He swears that "Elijah Evans deposited with Davies between \$150 and \$160 of money belonging to John Evans, and requested him to pay the same to John Evans, upon his, John Evans', return home, which Davies agreed to do." At the time of this deposit, John Evans was absent, on a visit to the State of Mississippi. This action is brought by John Evans, against the administrator of R. B. Davies, who died shortly after the deposit, for the money. The delivery of this money by John Evans, through Elijah Evans, his agent, to Davies, was, to our apprehension, a bailment, under the class *deposit*. A deposit is defined to be "a bailment of goods, to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust." *Story on Bailment*, §§ 41, 42. The delivery, in this case, if not a deposit, must belong to the class *mandate*; at least, if not a deposit, I do not see that it assimilates at all to any bailment, but that of *mandate*. If not a mandate, it must, then, be a deposit; but it is not a mandate—therefore, it is a deposit. Without the aid, however, of a syllogism, I think it is demonstrable that this is a deposit. A mandate "is a bailment of goods, without reward, to be carried

from place to place, or to have some act performed about them." *Story on Bailment*, §5. The difference between a deposit and a mandate, according to Sir William Jones, is, that the latter lies in feoffee, and the former in custody. *Jones on Bailm.* 53. That is to say, the depository is charged with *keeping* the goods only, and the mandatory with *doing something with or about them*. Mr. Story, holding that custody involves feoffee, and feoffee custody, excepts to Sir Wm. Jones' distinction, and says, "the true distinction between them is, that in case of a deposit, the principal object of the parties is the custody of the thing, and the service and labor are merely accessorial. In the case of a mandate, the service and labor are the principal objects of the parties, and the thing is merely accessorial." *Story on Bailm.* §140. The American jurist, I think, has the advantage of the British scholar, in fulness. The object of a mandate is, that the thing bailed may be transported from point to point, or that something be done about it. The object of a deposit is, that the thing be kept, simply. Without elaborating these distinctions, it is already seen, that this is a deposit. This money, delivered to Davies, was not to be carried anywhere, nor was anything to be done concerning it. By the evidence, the money was deposited with Davies, with a request to pay it to John Evans, upon his return home; which he agreed to do. It was a contract of deposit. There was a delivery, an undertaking to keep it until Evans returned home, and then to pay it to him. It would be a very unreasonable construction of the undertaking to pay it to Evans when he returned home, that it involves the obligation to carry it to him—to make a tender of it—in order to protect Davies from liability to suit. Davies had no interest in the matter; the custody of the money was assumed for Evans' benefit; and at the moment Evans did arrive, the money was then in Davies' hands, as his depository. Before he returned, no one had a right to demand it. When he returned, Davies held to him the relation of depository. Suppose there had been nothing said about paying the money to Evans when he returned, but the deposit had been simply for Evans, when he returns—the obligations of Davies would then have been just what they now are. He would have been bound to pay it to him upon demand—that is just his obligation now. Mr. Davies, then, was a depository; that is his legal character; a deposit is the legal character of the transaction.

What, then, under the law, are his obligations? They are two. First—it was his duty to keep the money with reasonable care. Nothing need be said about this obligation, for it is not sought to charge him for want of care. Second—it was his duty, *on request*, to deliver it, according to the trust. His obligation, by the terms of the trust, was to pay it, that is, deliver it, to Evans, upon his return. He was bound to deliver it on request; and upon refusal so to do, and not until then, has he violated his contract; and not until then was he liable to be sued for it. Such is the law which governs this species of bailment. If the request was preliminary—a condition precedent to liability—it was indispensable to aver it, and also indispensable to prove it. The exception to the declaration was well taken, and the plaintiff ought to have been non-suited.

As to the necessity of request, see *Story on Bailm.* §§61, 107. *Brown vs. Cook*, 9 Johns. R. 361. *Hofner vs. Clarke*, 2 Greenleaf's R. 308. 1 Dane's Abr. ch. 17, art. 1, 2. 2 Black. Com. 452. *Pothier's Traite, de Depot*, n. 22. As to the necessity of averring and proving a request, see *Com. Dig. Pleader*, c. 69. 1 Saunders R. 33, n. 2. 5 B. & Ald. 712. 1 D. & R. 361, S. C. 1 Taunt. 572.

[2.] The presiding Judge instructed the Jury, that it was necessary to prove the request in this case. He must, therefore, have believed that it was sufficiently averred. In looking into the declaration, I find no averment but the usual formal averment—"although often requested." Where request is a condition, as in this case, precedent to liability, that is not sufficient. The request must be so set forth, as that the Court may judge whether it is sufficient, according to the contract. *Hardw.* 38. *Skin.* 39. *Saund. on Plead. and Ev.* 1 vol. 131. 1 Chitty Plead. 244, '5. 1 Greenl. Ev. §51. It must be stated, with time and place, and by and upon whom made. 3 Bulst. 298. *Wallis vs. Scott*, 2 Stra. 88. *Back vs. Owen*, 5 T. R. 409. *Com. Dig. D. Plead.* c. 69.

[3.] Elijah Evans was called to prove the deposit of the money with Davies, and the terms and circumstances of the deposit. His testimony was excepted to, upon the ground of interest, and the exception overruled; and that is assigned for error. The witness was called to establish the liability of the defendant—to prove the payment, by him, of a sum of money belonging to the

plaintiff, to the defendant's intestate. In the absence of all such proof, the agent (the witness) would be himself liable to the plaintiff, his principal, for the money of his principal. He is called to fix a liability upon another, which, if established, would discharge himself. He is, therefore, interested. If there is a recovery for the plaintiff, I see no reason why that recovery could not be pleaded in bar of an action against him, for the same money. This point is fully settled in *Nisbet vs. Lawson*, 1 *Kelly R.* 282.

[4.] The presiding Judge, as before stated, instructed the Jury that a request was necessary to be proven, and that they might look into the testimony to ascertain if it was proven, and if they were satisfied that a demand was proven to have been made by Elijah Evans upon Wm. L. Johnson, the former administrator upon Davies' estate, then they would find for the plaintiff—and if not, they would find for the defendant.

Exception is taken to this charge, as being made in relation to a demand, about which there was no testimony. I have looked carefully into the evidence, and find no testimony whatever in relation to a demand by the plaintiff. This being true, it was error to instruct the Jury to look into the evidence, and if they found the demand proven, to find for the plaintiff, and if not, for the defendant. It has been, over and over again, decided by this Court, that it is error to instruct the Jury in reference to a matter of fact, about which there is no evidence. The language of the Judge is, that if they believed that a demand was made by Elijah Evans, they should find for the plaintiff. This was wrong, in any view of it. If he intended to be understood to instruct them, that if a demand was made by Elijah Evans, as the agent of John Evans, they should find for the plaintiff, he ought to have so expressed himself; but he does not. From what he does say, the Jury could have believed nothing else, but that he meant, that a demand by Elijah Evans, in his own right, would be sufficient to authorize the plaintiff to recover. If he is to be understood as assuming that the agency of Elijah Evans, in making a demand, was proven, the charge is equally erroneous; because there is not a particle of evidence to prove that agency. The agency of Elijah Evans, in *making the deposit*, is proven; but so far from his agency in making a demand being proven, or there being any testimony to prove it, the reverse is true. The

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demand which was made, and the only demand about which there is any evidence, was made by Elijah Evans, in his own right. He presented to Davies' administrator the account, made out in his own name—swore to it—and suit was actually brought upon it, in his name. All the evidence, in addition, as to demand, was irregularly admitted, because there was no demand averred.

Upon these grounds, let the judgment of the Court below be reversed.

No. 31.—JOSEPH ATTAWAY, guardian, &c. plaintiff in error, vs. NICHOLAS DYER, defendant in *fi. fa.* and B. H. CONYERS and J. C. PERKINS, claimants and defendants in error.

[1.] The privilege allowed to claimants, by the Act of 1821, of capriciously withdrawing claims once, must be exercised before a verdict has been rendered for damages against them, in favor of plaintiffs in execution—it cannot be done afterwards, so as to take the case out of Court, notwithstanding an appeal has been entered.

[2.] The question discussed, Whether, under our Statute, where the defendant, upon a plea of set-off, recovers a balance against the plaintiff, the plaintiff has a right, on the appeal, to dismiss his action so as to defeat the judgment?

Claim on appeal, from Coweta. Decision by Judge HILL, at September Term, 1849.

In this case there had been a claim of the land levied on, and a damage bond given. On a Jury trial, September, 1848, they found the property subject, and, also, 50 per cent. damages for claiming for delay. Claimant appealed, and after the parties announced ready for trial, at September Term, 1849, the claimant moved to withdraw his claim—not having withdrawn it before—which was allowed by the Court—the plaintiff objecting. Plaintiff then moved a judgment that the land be sold, and that the Clerk issue execution on the verdict for damages, which had

been rendered at September Term, 1848. This was refused as to the issuing a *f. fa.* for the damages, but allowed the order that the levy proceed as to the land.

To which several rulings exception is taken, and the case brought up.

BUNCH, for plaintiff in error, cited—

Prince's Digest, 426, 448.

STOKES, for defendant in error, cited—

Campbell vs. Howard, 5 Mass. R. 376. *Pennhallow vs. Doane*, 3 Dallas, 87, 119. *Keen vs. Turner*, 13 Mass. 266. *Yeaton vs. United States*, 5 Cranch, 281. *The Venus*, 1 Wheat. 113. *Carver and wife vs. Buchanan*, 2 Kelly, 337. *Payne vs. Cowden*, 17 Pick. 142. 20 Pick. 510.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The preamble to the Act of 1821, (*Prince*, 448,) recites, that "Whereas, various constructions have been given in the different Courts of this State, as it regards claims of property, which tend to the manifest injury of the community, and frequently produced, *not only injustice to the plaintiffs in execution, but which tended evidently to oppress and harrass them by delays of justice*—

"Sec. 1. *Be it therefore enacted*, That when any Sheriff or Coroner shall levy an execution on property, claimed by any person not a party thereto, such person shall make oath to the same, and it shall be the duty of the officer to postpone the sale until the next term of the Court from whence said execution issued: *Provided*, said execution is levied on *personal* property; but should it be levied on real estate, and claimed, then the report is to be made to the next term of the Superior Court of the County in which the land lies; and the Court to which the claim is reported, shall cause the right of property to be decided on by a Jury at the *first* term, unless special cause be shown to continue the case for *one* term, and *no longer*: *Provided*, also, the person claiming said property, his agent or attorney, shall give bond to the levying officer, with good and sufficient security, in a sum equal to double the amount of the

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property levied on, at a reasonable valuation, to be judged of by the levying officer, conditioned to pay the plaintiff all damages, which the Jury, on the trial of the right of property, may assess against him, in case it should appear that said claim was made for the purposes of delay; and every Juror on the trial of such claim, shall be sworn, in addition to the oath usually administered, to give such damages, not less than ten per cent. as *may seem reasonable and just to the plaintiff* against the claimant, in case it shall be sufficiently shown that said claim was made for delay only; and it shall be lawful for such Jury to give verdict in manner aforesaid, by virtue whereof judgment may be entered up against such claimant and his security or securities, for the damages so assessed by the Jury, and the cost of the trial of the right of property: *and provided, also, that the burden of proof shall lie upon the plaintiff in execution, in cases where the property levied on is, at the time of such levy, not in possession of the defendant in execution.*"

Sec. 2. "Whenever such claim of property may be made in terms of this Act, the person claiming property levied on and returned to the proper Court, by the levying officer, shall not be permitted to withdraw or discontinue his said claim, more than once, without consent and approbation of the plaintiff in execution, or some person duly authorized to represent such plaintiff; but said Court shall proceed to the trial of said claim of property, in manner aforesaid, and it shall be the duty of the Jury to award damages accordingly: that either party who may be dissatisfied with the verdict of said Jury, may enter his, her or their appeal to a Special Jury in the Superior Court, in the County where said trial may have been had; *which appeal shall be subject to the same rules and regulations which govern in appeals in ordinary cases.*"

The question for our consideration is, whether a claimant against whom, not only a verdict and judgment of condemnation, finding the property subject, has been rendered, but, also, damages have been assessed by the Jury for the injury done the plaintiff by the delay, can, under the provisions of the foregoing Act, so withdraw his claim, *capriciously* and without the consent of the opposite party, as to take the case out of Court, and thus defeat the rights of the plaintiff in the recovery?

Upon the most mature reflection, and careful examination of

the Statute, we are constrained to put upon it a different construction from that which has usually obtained in the Circuit Courts of the State.

By reference to the preamble, we are enabled to ascertain, distinctly, the object of the Legislature in the enactment of this law. A practice had prevailed, as it regarded the claims of property, under the 33d section of the Judiciary Act of 1799, "which tended to the manifest injury of the community, and frequently produced, not only injustice to the plaintiffs in execution, but which tended evidently to oppress and harrass them *by delays of justice.*"

This, then, was the mischief which the Assembly designed to provide against; for they say, "be it *therefore* enacted," &c. This Act, consequently, should be liberally construed for the benefit of judgment creditors. If we can so interpret it as to secure to claimants the privilege guaranteed to *them*, and at the same time maintain all the just rights of *plaintiffs in execution*, it is our duty to do so.

By attending strictly to the phraseology in the first part of the *second* section, it will obviously occur, I think, that the ceremony of withdrawing the claim is to *precede the trial*. After declaring that the claimant shall not withdraw or discontinue his claim, more than once, without the consent and approbation of the plaintiff in execution, it immediately adds: "*but said Court shall proceed to the trial,*" viz: as a thing subsequent in point of time. It then goes on to authorize an appeal, subjecting it to the same rules and regulations as govern in appeals in ordinary cases. We hear nothing farther, *after the trial*, of the claimant's right to withdraw—that had been previously adjusted. Well, one of the regulations which govern in appeals, in ordinary cases, is, "that no person shall be allowed to withdraw an appeal after it shall be entered, but by the consent of the opposite party." *Prince*, 426. It would seem, therefore, that so far from extending to claimants the right to withdraw the claim, on appeal, so as to defeat the judgment which had been rendered against them in favor of the plaintiff, that the Legislature had it in their mind to guard expressly against such a result.

So much for the mere verbal criticism upon the language of this law.

It may be argued, however, that notwithstanding the burthen

of proof lies on the plaintiff in execution, and that he is entitled to open and conclude the argument, that still the claimant sustains the relation of *plaintiff* in the cause; that he holds the *affirmative*; that he makes the issue, by coming in between the creditor and debtor, and swearing that the property levied on is his; that the proceeding, by claim, was given in the place of the remedy, by action, for damages against the officer selling the property of a third person. All this may be conceded. It may be yielded that our Claim Laws are *cumulative* only in their character; that they do not repeal the Common Law, in terms or by implication; that the owners of property, instead of interposing their claim, may still bring trespass, or trover, or ejectment, to try the rights of property; and that, in that event, they would, of course, occupy the *status* of plaintiffs in these several actions. It by no means follows, however, that where the owner elects to try the right of property, under our Claim Law; that the same legal attributes will appertain to his character.

But admit, as a general rule, that this position is true; that upon the trial of the claim, as in ordinary suits at Law, the *status* of the claimant is the same; and that after an appeal is entered, he is entitled to the same privileges of plaintiffs in such suits, (and surely he can ask no more,) does it follow, necessarily, that by *voluntarily* going out of Court, he can relieve himself of the verdict which has been assessed by the Jury against him, as a compensation to the plaintiff for the injury he has sustained? Has any plaintiff, in ordinary suits, such a privilege? We think not.

There is no doubt but that at Common Law, and usually in this State, the plaintiff may dismiss his suit whenever he chooses. He is the only party seeking a remedy—he alone asks the aid and action of the Court. The defendant stands in the attitude of resistance. He opposes the suit of his adversary, and endeavors to defeat it. If the plaintiff sees fit to retire from the case and the Court, it is all the defendant can ask. He accomplishes pretty much all that he could attain at the end of the trial, and is relieved from the hazard and risk of the result.

[2.] But suppose, under our Law of Set-Off, a verdict and judgment are rendered for the defendant, for a balance against the plaintiff, can it be contended, for a moment, that the original plaintiff, by entering an appeal, could dismiss his suit and thus defeat the recovery?

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The Judges in Convention, I have been informed, held otherwise; and the Supreme Court of Tennessee, in *Riley & White vs. Carter*, (3. Humphreys' Rep. 230,) ruled, under such circumstances, that the plaintiff had no right to dismiss his action without consent of the defendant; that the plea of set-off was in the nature of a cross-action; and that if the matter of set-off be larger than the plaintiff's demand, the defendant then stands in the attitude of the plaintiff, and has all the rights of the plaintiff; that however they may be named in the proceeding, the real status of the parties is changed; that the original defendant has become plaintiff, and the plaintiff defendant, to all intents and purposes; and that, thenceforth, the defendant, in ordinary cases, might just as well, and with as much reason, dismiss plaintiff's suit against him, as a plaintiff can do so in a case where the defendant has pleaded, *successfully*, a set-off larger than his demand. The party to whom the balance is due, has as much right to the decision of the issue in his favor, in the latter as in the former case; that at Common Law, the plea of set-off, although a cross-action, is purely defensive—all it aims at is to defeat the suit; that under the Statute authorizing a recovery for the balance which may be found due, it is still a cross-action, but with a view to a judgment against the other party; and that the plaintiff cannot, by dismissing his suit, escape from the issue which he has voluntarily made.

Placing claimants, then, in the same attitude of plaintiffs, in ordinary suits, to my mind the reasoning is conclusive, that when saddled with a judgment for damages, they cannot, of their own accord, throw it off by going out of Court. It is contrary to all the analogies of the law. Our conclusion, therefore, is, that the Legislature never intended to sanction such a practice.

Is it to be presumed, that they designed to permit a claimant to join issue with the plaintiff in execution, upon the trial of the right of property—take the chances of a verdict—and if found against him, resort to this mode of escape? Is it not to make a mockery of the Courts thus to consume the time of the country? It will be noticed, too, that the bond given by the claimant is peculiar. It does not indemnify the party against all damages which he may sustain on account of the claim being interposed, but such only as the Jury may assess, in case it should appear that the claim was made for delay only; so that, if the plaintiff is de-

prised of the compensation awarded to him, *by the Jury*, he is altogether remediless. The words of the Statute would have to be exceedingly clear and explicit to justify a construction that would work such an evil.

Recollecting the familiar rule, that every Statute ought to be construed for the preventing of delay, as much as possible, (2 *Just*, 611, 614. 6 *Bac. Abr. tit. Statute, let. i.*) we hold, that the privilege allowed to claimants, by the Act of 1821, of capriciously withdrawing their claim *once*, must be exercised before a judgment has been rendered, assessing damages in favor of the plaintiff in execution, as a compensation for the injury he has suffered; that at any stage of the proceeding the claimant, like any other party, may cease to litigate his rights, by discontinuing his claim; *but that this does not withdraw the case from the Court*; that if an appeal has been entered, it may, like any other suit, be dismissed by the consent of parties; otherwise, if the claimant decline prosecuting his claim, the plaintiff in execution will proceed, *ex parte*, with his case, on the appeal trial—it being discretionary with the Special Jury, as in all other cases, to ratify the first verdict, or increase or reduce it, as to them shall seem just, upon all the facts and circumstances which shall be submitted in evidence.

The judgment, consequently, must be reversed, and the cause remanded, to take the direction herein indicated.

No. 32.—AUGUSTINE C. ROGERS, plaintiff in error, vs. JOHN S. PARHAM, defendant.

[1.] Where P entered into a special written contract with R as an overseer, for the year 1847, and was to receive a stipulated portion of the crop, at the end of the year, for his services, and in the month of August of that year, R dismissed P from his employment, without sufficient cause or provocation, whereupon P, in the month of November, of the same year, instituted his action against R, to recover damages for a breach of the contract; *Held*, that the action for damages for a breach of the contract, on the part of the

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defendant, was not *prematurely* brought; and that in regard to this particular class of special contracts, when the overseer or agent is *wrongfully* dismissed from the service of his employer, he has his election of three remedies: 1st. He may bring an action, *immediately*, for any *special injury* which he may have sustained in consequence of the breach of the contract by the defendant; 2d. He may wait until the termination of the period for which he was employed, and then sue upon the contract and recover his whole wages; 3d. He may treat the contract as rescinded, and may *immediately* sue on a *quantum meruit*, for the work and labor he actually performed.

Case, in Crawford Superior Court. Tried before Judge Floyd, August Term, 1849.

This was a special action, on the case brought by John S. Parham against Augustine C. Rogers, for the breach of a contract, in writing, by which Parham was bound to act as overseer for Rogers, for the year 1847, in consideration of which he was to receive a certain portion of the corn, cotton, fodder and wheat made on the farm. The breach alleged (in three counts, varied,) was that Rogers, about the 12th August, 1847, peremptorily and without cause, dismissed Parham from his employment, to his damage \$500. Several pleas were filed, unnecessary to be referred to particularly.

On the trial, before the cause was submitted to the Jury, Rogers, by his counsel, moved a non-suit, on the ground that the action was commenced before the cause of action accrued—the agreement being for the year 1847, and the suit being commenced on 29th November, 1847. The Court overruled the motion, and defendant excepted.

The evidence showed, that a difficulty had arisen between the parties; Parham abused him, when Rogers insisted on Parham's quitting his business; that Parham at first refused to do so; that subsequently he left, and they agreed to refer the matter to arbitrators. James Stephens, a witness for plaintiff, swore that both parties told him they had agreed to quit and leave it to men; and E. L. Harris swore, that defendant told him that plaintiff proposed to quit and leave it to men. It was also proven, that defendant, Rogers, while he wished it settled, refused to let Parham return to work and gather the crop, when the latter proposed it, saying, "We agreed to quit and arbitrate, and you can't go to work." The arbitration failed, because one arbitrator refused to

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act, unless Rogers would be sworn to abide the award. The latter pledged his word and honor, but had religious scruples as to *swearing*. One witness says, Rogers gave as a reason for his said last refusal, that Parham had proposed, that "as they could not agree, to leave it to men." Another witness adds, that Rogers farther said, he was willing to go into the arbitration and abide the award, without either party being sworn.

Plaintiff having closed, defendant moved a non-suit, on the ground that plaintiff's own witnesses showed that he left voluntarily, and that the contract was mutually rescinded; and there was no count in plaintiff's declaration, except for a breach of the contract, and none under which the contract could be apportioned. The Court overruled the motion, and defendant excepted.

The Court charged the Jury, that if they believed from the testimony, the parties mutually agreed to rescind the contract before the end of the year, the plaintiff in this form of action was not entitled to recover; but if defendant dismissed plaintiff, without sufficient cause or provocation, the plaintiff was entitled to recover the damages actually sustained. To this charge defendant excepted. The Jury found a verdict for the plaintiff.

A motion was made for a new trial, on the ground that the verdict was contrary to law and evidence; which motion the Court overruled, on the ground that there was some evidence to support the verdict, and there were two concurring verdicts of Special Juries.

To this decision defendant excepted, and these several decisions are alleged as error.

HUNTER and HAMMOND, for plaintiff in error, cited—

Chitty's Pl. 269 and note, 372. *Dudley's R.* 91. 12 *John.* 166. 19 *Ib.* 337. 4 *McCord*, 246, '9. 2 *Hill*, 477. 2 *Smith's Lead. Cas.* 24. 5 *Bos. & Pul.* 61. 7 *Ga. Rep.* 283. 4 *Ib.* 193. *Gram on New Trials*, 278. 34 *E. C. L. R.* 154.

G. J. GREEN and S. HALL, for defendant in error, cited—

7 *Hill's (N. Y.) Rep.* 75. 14 *Vert. R.* 311. 1 *Hill, (N. Y.)* 487. 11 *Wheat.* 237. *Chitty on Bills*, 370, 371. *Buller's N. P.* 269, 3 *East*, 481. 3 *J. R.* 202. 4 *Ib.* 144. 5 *Ib.* 375. 3 *Mass.* 557. 8 *Ib.* 461. 2 *Smith's Lead. Cas.* 22. 2 *C. & P.* 37.

12 E. C. L. R. 177. *Graham on New Trials*, 541, et seq. 5
Mees. & Welles. 279.-

By the Court.—WARNER, J. delivering the opinion.

[1.] There are but two questions presented by the record in this case, for our judgment. 1st. Did the Court err in refusing to non-suit the plaintiff? It appears that the plaintiff and defendant entered into a written, special contract, by which the former was to act as the overseer of the latter, for the year 1847, and to receive a stipulated portion of the crop for his services. The plaintiff alleges that the defendant, in the month of August, dismissed him from his employment, and this suit was instituted in November, 1847, to recover damages from the defendant, for a breach of his special contract. The defendant insisted, that the plaintiff should be non-suited, because the action was *prematurely* brought; that the action could not be maintained against the defendant for a breach of the contract, until the expiration of the year 1847. We are of the opinion the Court below properly overruled the motion for non-suit. In regard to this particular class of special contracts, we adopt the rule stated by *Smith*, in his note to the case of *Cutter vs. Ponell*. When the overseer or agent is *wrongfully* dismissed from the service of his employer, he has his election of three remedies.

1st. He may bring an action, immediately, for any *special injury* which he may have sustained, in consequence of a *breach* of the contract.

2d. He may wait until the termination of the period for which he was employed, and then sue upon the contract and recover his whole wages.

3d. He may treat the contract as rescinded, and may *immediately sue*, on a *quantum meruit*, for the work and labor he actually performed. 2. *Smith's Leading Cases*, 27.

Here, the plaintiff has elected to sue immediately for the *special injury*, which he alleges he has sustained by the breach of the defendant's contract, as was done in the case of *Masterton vs. The Mayor of Brooklyn*, (7 *Hill's N. Y. Rep.* 61.) That the plaintiff might have sued before the end of the year, for any *special injury* which he may have sustained in consequence of the defendant's breach of the contract, I do not doubt; but inasmuch

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as the plaintiff in this case has alleged no *other injury*, arising from the *breach* of the contract, than that stipulated by the contract itself, to wit: the non-payment to him of the value of his part of the crop, I have a doubt in my own mind, whether this is not substantially an action on the contract itself, to recover the plaintiff's share of the crop, stipulated by that contract, to be paid him at the *end of the year*. However, my *brethren* are very clear, that it is an action for a *breach* of the contract, and, as I believe substantial justice has been done between the parties by the verdict, I concur with my brethren in their judgment, in overruling the motion for a non-suit.

The second ground of error taken, is to the charge of the Court to the Jury. The Court charged the Jury, that if the parties mutually agreed to rescind the contract, before the end of the year, the plaintiff in this form of action was not entitled to recover; but if the defendant dismissed the plaintiff from his service, without sufficient cause or provocation, the plaintiff is entitled to recover whatever damages he has actually sustained. As to the ~~fact~~ of the parties mutually agreeing to rescind the contract, the testimony was *conflicting*, and that question was properly left to the Jury. We are of the opinion there was no error in the charge of the Court to the Jury, in point of law.

Let the judgment of the Court below be affirmed.

NO. 33.—JACOB LOWE *et al.* plaintiffs in error, vs. JOHN MOORE and another, defendants.

[1.] A and B both have judgments open against C, and a fund raised from C's property is before the Court for distribution; B's judgment is the oldest, but has been levied upon land as the property of C, which land has been claimed, and a verdict rendered on the claim in favor of the claimant: *Held*, that the levy on the land does not affect the lien of B's judgment on the fund, and that it is entitled to it, as the oldest lien.

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[2.] In the distribution of a fund before him, the Judge of the Superior Court acts upon equitable principles, but he can act only on a fund *in hand*, and confessedly for distribution.

[3.] In the case above, the Court has no right to impose the terms upon B, to wit: that he should take the money, if he would dismiss his levy on the land, or agree not to appeal from the verdict rendered against him in the claim case.

Motion, in Crawford Superior Court. Decided by Judge FLOYD, August Term, 1849.

The question in this case arose upon a motion to distribute money, returned by the Sheriff, as raised on a *fi. fa.* in favor of John Moore *vs.* Andrew J. Preston. Jacob Lowe, who held an older *fi. fa.* claimed the fund. On this *fi. fa.* was a levy on a lot of land disposed of, and said to be unaccounted for. It was proved to the Court, that the land was claimed by a third person, and a verdict of "not subject," found by a Petit Jury, on the first trial at that term of the Court.

The Court ruled, that "if plaintiff (Lowe) would not appeal, or would dismiss the levy, he was entitled to the money."

Lowe declining to do either, the Court ordered the money paid to the *fi. fa.* in favor of Moore; and this decision is brought up for review. There was no evidence as to the sufficiency of the property to satisfy the execution, and no evidence before the Court showing that the older *fi. fa.* was entitled to the *two* funds, and the younger to but *one*. It did not appear that Lowe's *fi. fa.* had a lien even on the property levied on. The presumption, from the finding of the Jury, was rather the reverse.

G. R. HUNTER, for plaintiffs in error.

HAMMOND and POWERS & WHITTLE, for defendants.

By the Court.—NISBET, J. delivering the opinion.

[1.] It was the duty of the Court, in this case, to apply the money raised out of the defendant in execution's property to the oldest lien before it. Judgments bind *all* the property of the defendant from their date. Lowe's judgment was the oldest, and it was plainly entitled to the money, if it was a valid, subsisting

judgment. Was it? We think it was. The objection to it was, that it had been levied upon real estate of the defendant; that a claim had been put in to the real estate—was pending—and at the then term of that Court, had been tried before a Petit Jury, and a verdict rendered in favor of the claimant. All this does not interfere one whit with the lien of the judgment. A levy on lands—disposed of or not, accounted for or not—does not affect it. If the money has been raised on it and paid to the judgment, or is in the hands of the officer, that is a different thing. If paid, of course it is extinct. If there is money in the hands of the officer, upon which it has lien, it will be applied to it. Here, there is a levy. That, I say, does not affect the right of the execution levied to take this fund, if it is the oldest. A levy on land is no satisfaction. *DeLoach & Wilcoxon vs. Myrick*, 6 Ga. R. 410. *Newton vs. Nunnally*, 4 Ga. R. 356. *Prince's Dig.* 426.

The equitable principle, that if A and B have liens on the property of the same person, and A attaches upon two funds and B upon but one, A will be turned upon that fund upon which B has no lien, in order that both may be paid, has been invoked to sustain the right of the junior *fi. fa.* to this money. The principle is a sound one, but has no application here. *Non-constat*, that Lowe's lien attached upon two funds—*constat*, the contrary. It does not appear that the land levied on was subject to it; but it does appear, that its lien on the land was contested—a third person had claimed it. Not only so, but it does appear, by the record, that upon the trial of that claim, a Jury had found in favor of the claimant and against the lien.

[2.] The Judge of the Superior Court, in distributing a fund before him, acts upon equitable principles; but his action is upon a fund *in hand*, and confessedly now for distribution. This *land fund* was not in hand—it was judicially known to him that it was in litigation, and so far as the proof went, he knew that the judgment of Lowe *did not* attach upon it. Nothing short of a bill and a decree thereon, adjudging the land subject to Lowe's *fi. fa.* would, in my judgment, authorize the postponement of his lien and the payment of this money to a junior judgment.

[3.] The Court ruled, that this oldest judgment might take the money, if the plaintiff, Lowe, would *dismiss* his levy on the land, or agree not to enter an appeal from the verdict of the Petit Jury, in the claim case. This is not a case where the Court had

power to impose conditions. The plaintiff, Lowe, had the right to stand upon his legal rights. They were not doubtful. The Court had no power to set aside a valid, subsisting lien. The law gave it, and there was no discretion in the Court to put the enforcement of it, upon any terms, much less such as are onerous and might prove the occasion of actual loss to the plaintiff.

Let the judgment be reversed.

No. 34.—ISAAC DENNIS, Jr. and another, plaintiffs in error, vs. G. J. GREEN, administrator, &c. defendant.

- [1.] The Court will dissolve an injunction, on the coming in of the answer of the defendant, who alone is interested, negating all the facts and circumstances charged in the bill, and upon which its equity is based, though all the defendants have not answered.
- [2.] Where the answer of the defendant is made, and sworn to, before his death, it may be used, on a motion to dissolve the injunction, though filed in Court subsequently.
- [3.] A bill may proceed, without making the representatives of a mere formal party, parties to the proceeding.*
- [4.] So, if the deceased was a necessary party to the final decree to be rendered, but not interested in the injunction, a motion to dissolve the injunction need not be postponed until the representatives are made parties.

In Equity, in Crawford Superior Court, before Judge FLOYD, August Term, 1849.

G. J. Green, as administrator of D. M. Causey, filed a bill in Equity, against Isaac Dennis, Sr. and Isaac Dennis, Jr. alleging, among other things, that Causey and one Jeremiah Dennis, had been partners in the business of selling merchandize, and unfortunate therein; that Causey advanced large sums to pay off their indebtedness; that, having no funds to pay a debt to J. W. & R. Levette, their joint note was given, which note was also signed

*See *Smith & Shorter vs. Mitchell*, 6 Ga. Rep. 469.—[Rep.]

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by Isaac Dennis, Sr. the father of Jeremiah Dennis, who agreed, at the time, to pay one half of it, as a donation to his son; that, subsequently, suit was commenced on this note, and judgment obtained against Causey, as surviving partner, and, also, against Isaac Dennis, Sr.; that Jeremiah Dennis died, pending the suit, and administration on his estate was granted to Isaac Dennis, Sr. and Isaac Dennis, Jr. who took possession of the assets; that the administrators agreed and promised Causey to pay off this judgment, obtained against him as surviving partner, with the assets of the estate, and to pay to Causey the amount due him for advancements for the firm. The bill charged that Isaac Dennis, Jr. had paid off this judgment, but, fraudulently combining with his father, took a transfer to himself, for the purpose of pressing the same against Green's intestate, Causey, who had then died; and also, for the purpose of relieving Isaac Dennis, Sr. from the payment of one-half of the same, according to his agreement and promise. The bill farther charged, that the administrators had wasted the assets, in pretending to pay accounts—among others, a large account to Isaac Dennis, Sr.; that they were fraudulently seeking to make the estate of Causey pay the judgment before stated, and had caused the same to be levied on property belonging to his estate, while there was a sufficiency of assets in their own hands to pay it. There were several other allegations of fraud, and a prayer for an injunction and relief.

The answers of the defendants were drawn and sworn to 15th January, 1849, and filed in the Clerk's office on 5th February, 1849. Previous to the filing of the answer, Isaac Dennis, Sr. died. At the February Term, 1849, defendants' solicitor moved to dissolve the injunction, because the equity, if any, in the bill, was sworn off by the answers. The death of Dennis, Sr. being suggested of record, the Court made no decision at that term, and at August Term, 1849, refused to dissolve the injunction, on the ground, that Isaac Dennis, Sr. was a necessary party to this bill, and complainant was entitled to his answer; that the Court could not consider or notice, judicially, the answer filed after the death of Dennis; and the Court could not entertain a motion to dissolve the injunction, until the representatives of Isaac Dennis, Sr. were made parties.

Which decision of the Court is assigned for error.

HUNTER, for plaintiff in error.

G. J. GREEN, STRONG and HALL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

In February, 1846, J. W. & R. Levette obtained a judgment against one David M. Causey, upon which an execution issued, and was transferred, by the plaintiffs, to Isaac Dennis, *Junior*, in the month of May thereafter, and was levied by the assignee, in 1848, on a house and lot in Knoxville. Causey, the defendant, being dead, Gilben J. Green, his administrator, filed an injunction bill against Isaac Dennis, *Junior*, and Isaac Dennis, *Senior*—both individually, and as administrators of Jeremiah Dennis, deceased, and Joel B. Morgan, Deputy Sheriff. The bill was made returnable to the February Term, 1849, of the Superior Court of Crawford County. Intermediate the service and appearance term, Isaac Dennis, *Senior*, departed this life—his answer having been previously made and sworn to, and filed in Court, subsequent to his death.

[1.] Application was made to dissolve the injunction, upon the ground, that the answers had fully denied all the equity in the bill; but this motion was refused by the Chancellor, for the reason, that Isaac Dennis, *Senior*, was a *necessary* party to the bill; that he could not *judicially* consider his answer, having been filed after his death; and that he would not entertain the motion to dissolve the injunction, until the representatives of Isaac Dennis, *Senior*, were made parties defendants to the bill.

Was the Court right in refusing to entertain the motion to dissolve the injunction?

It will be observed, that the execution which was enjoined, was the exclusive property of Isaac Dennis, *Junior*, who held it, and was seeking to enforce it, by virtue of an assignment to him, *individually*, from the Levettes, the original plaintiffs. Conceding, then, what is assumed by the Court below to be true, that Isaac Dennis, *Senior*, was a *necessary* party to the case made by the bill, does it follow, that the assignee of the *fi. fa.* whose legal rights were restrained, was compelled to wait until the estate of old man Dennis was represented, before he could take steps to get rid of the injunction? It seems to me, that, to hold up the

injunction on that account—when, if the representatives were made a party, it is apparent that the interest of their testator or intestate could, in no wise, be affected by the interlocutory decree respecting the injunction—would be a great perversion of justice.

The principle seems to be well established, that whenever the party against whom the injunction operates, fully answers the bill, denying the equity, it is competent for such party to move, at any time, for a dissolution of the injunction, without waiting for the answers of the other defendants. 3 *Davis' Ch. Plead. & Pr.* 1824. *Newland's Ch.* 98. *Joseph vs. Doubleday*, 1 *Ves. & Beam.* 497, '8. *Glascott vs. The Copper Mines Company*, 11 *Sim.* 314. *Breedlove vs. Stimp*, 3 *Yerg.* 257. *Goodwyn vs. State Bank*, 4 *Dessauss. R.* 389.

[2.] But here, the answer of Isaac Dennis, *Senior*, was made and sworn to, before he died. It was called for by the complainant, to prove the community of interest between the defendants. Being dead, he can never get any other or further answer. For what purpose, then, should this injunction be continued against Isaac Dennis, *Junior*? It could avail nothing, to postpone the hearing of this application, in order to make the representatives of Isaac Dennis, *Senior*, a party. Suppose, being appointed and qualified, they should attempt to withhold from the Court the answer made by the deceased—would not the Chancellor force them to file it, if it had not already been done? Would not the complainant be entitled to the full benefit of the admissions which it contains, as to the fraudulent combination between the father and the son? Equally competent, we apprehend, is it, for Isaac Dennis, *Junior*, to use this answer, to get rid of the injunction, provided it negatives all the facts and circumstances charged in the bill, in order to obtain the injunction.

[3.] But we do not rest our judgment mainly upon this ground, but upon the other view, namely, that as to the *injunction*, Isaac Dennis, *Senior*, is a mere *formal* party.

[4.] Where all the defendants are interested in the injunction, as well as the final decree to be rendered, there is a diversity of authority to be found in the books, as to whether or not *all* the defendants must answer, before the dissolution of the injunction can be granted. 2 *Eq. Cas. Ab.* 2, *marg. note (a)*. In our judgment, however, this is not such a case.

Judgment reversed.

No. 35.—JOHN M. SETTLE, plaintiff in error, vs. HENRY L. ALLISON and wife and others, defendants.

- [1.] Where it appeared that by the law and usage of the Courts in the State of Virginia, the Clerk's certificate of the County Court, that a will was duly admitted to ~~probate~~ and record, would be sufficient evidence of that fact in that State: *Held*, that the same faith and credit should be given to the records and judicial proceedings of the State of Virginia, when offered in evidence in the Courts of this State, as they would have received in the Courts of the State from whence the same were taken.
- [2.] Where the record and judicial proceedings of the County Court of Mecklenburg County, in the State of Virginia, were offered in evidence, under the Act of Congress, Abram Keen certified that he was the presiding Magistrate of Mecklenburg County: *Held*, that the presiding Magistrate should have certified, that he was the presiding Magistrate of the County Court of Mecklenburg County, from whence the record was taken.
- [3.] When a subscribing witness to a written instrument, resides beyond the jurisdiction of the Court, the regular mode to prove *its execution*, is to prove the handwriting of the witness; but where a receipt or other written instrument, is more than thirty years old, *its execution* need not be proved to admit it in evidence, although the subscribing witness may be living.
- [4.] The declarations of a vendor, who has parted with the title to property, are illegal, when sought to be given in evidence against his vendee, unless it clearly appears he was the owner of, or in possession of the property, *at the time the declarations were made*.
- [5.] When the evidence is conflicting, in regard to the main point in controversy between the plaintiffs and defendant, for the admission of *illegal* evidence by the Court, which *might*, and probably did, decide the question in favor of the plaintiffs, in the mind of the Jury, a new trial will be granted.
- [6.] In an action of trover, for the recovery of slaves, in which there are several plaintiffs of different ages, and the Statute of Limitations is relied on, it is not error for the Court to charge the Jury, that they *can* find a verdict in favor of those who are not barred by the Statute, and against those who are barred; and the verdict of the Jury should specify who of the plaintiffs they find for, and against whom they find; otherwise, the verdict would be imperfect in not finding all the issues submitted.
- [7.] When a Jury have rendered an imperfect verdict, by not finding all the issues submitted to them; as, where they found a verdict in an action of trover, in favor of only four of the plaintiffs, when there were eight, without finding either for or against the other four: *Held*, that after the verdict had been received and recorded, and the Jury discharged from the farther consideration of the *cause*; that it was error in the Court, after the expiration of four days, to re-assemble the Jury and amend the verdict according to what the Jury *then stated* it was their intention to find—such intention not appearing on the face of the verdict.

Settle vs. Alison and others.

Trover and conversion, in Monroe Superior Court. Decision by Judge FLOYD, at September Term, 1849.

This action was brought by the children of Reuben M. Rainey and Catharine, his wife, formerly Catharine Cleaton, for a slave, Minerva, (and her issue,) that was sold by said Reuben M. to John M. Settle, alleging that said Minerva did not then belong to said Reuben M.; that they had been only *lent* to his wife, Catharine, during life, and after her death, by the will of Catharine's father, Thomas Cleaton, of Virginia, were to be equally divided between her children.

Catharine had died before suit. The testimony was voluminous and *very conflicting*. Thomas Cleaton made the will 25th February, 1818, and died in March after.

The plaintiffs below proved, that Reuben M. Rainey moved from Virginia to Georgia, about 1811 or 1812, and did not then bring with him Minerva; had just married; that the slave was never out of possession of Thos. Cleaton, after the marriage of Reuben M. Rainey, until the death of Cleaton, in March, 1818; that the executors divided his estate, 16th March, 1818; that on said 16th March, 1818, the executors delivered Minerva to Reuben M. Rainey, (in Virginia,) and took his receipt for her and a boy named Stephen; that Cleaton had but one slave, named Minerva, at Rainey's marriage, or up to testator's death; that Minerva was then some ten or twelve years old.

One witness supposed the age of Minerva, in 1827, to be fifteen or sixteen years; and that, in 1827 or '28, Rainey owned no other negroes but Minerva and Stephen.

One witness (Rainey's brother) knew Minerva, and states that she first came into the possession of Reuben M. between the spring of 1818 and spring of 1820; that Reuben M. went to Virginia, in the spring of 1818, and that Minerva was not then "in his possession at his residence in Greene County;" that in the early part of the winter of 1820, he was at Rainey's house and then first saw Minerva in his possession; that Reuben M. moved from Green to Jasper, early in 1821.

Eliz. King, (sister of Reuben M.) swore that she knew Reuben M. and Minerva, and knows that he came into possession of Minerva after witness heard of the death of Thomas Cleaton; she came to Georgia with Reuben M. and wife; they brought only

one negro, Anaka; and after Cleaton died, he went back to Virginia and then brought Minerva (and Stephen.)

Defendant then proved the sale, and introduced the bill of sale from Reuben M. to John M. Settle, dated 15th December, 1828. The witness first knew Reuben M. in the forepart of 1818, in the County of Jasper, and at that time Reuben M. had *three* or *four* negroes.

Wm. Bradey swore, that he first got acquainted with Reuben M. "the 27th or 28th of December, 1817;" in March, 1818, he, Reuben M. lived in Jasper County; he lived in half mile of him, and he "did *not* go to Virginia during *March*, 1818; was not absent from home over a day or two at a time;" and Reuben M. had Minerva in possession when witness first knew him; *knows* that Reuben M. had the girl, Minerva, in his possession before March, 1818—the same girl he sold Settle in December, 1828; he, also, got acquainted first in Jasper County, in 1817.

Thos. Stocks knew Reuben M. from about 1810 or 1811 to 1816 or '17, when he moved from Green to Jasper; that during that time he had in his possession a girl named Minerva, and carried her with him; supposes the girl, at the removal, was ten years old, and Reuben M. controlled said girl as his own; thinks he came in possession of Minerva about 1815 or 1816.

Flewellen swore that Reuben M. moved to Jasper, last of December, 1817, and then had Minerva; he then had, also, Stephen, Beck, &c.

Plaintiff then, *after objection*, introduced the sayings of Reuben M. that Minerva (and Stephen) had been given to his wife and children, by her father, and could not be sold for his debts, &c.

Defendants below first objected to the copy of the *will*, because there was no copy of the probate, but only the Clerk's certificate that it was proved.

2d. That said will is not properly authenticated—the certificate purporting to be by the "presiding Magistrate of the County, instead of the Probate Court;" which the Court overruled.

3d. Settle objected to the receipt of Reuben M. for Minerva, because there was a witness to it, whose handwriting was not proved, and he not introduced, (and it appeared he was not dead.) This was overruled also, and paper let in.

4th. That after defendant below closed, plaintiffs offered the sayings of Reuben M.—which defendant objected to, because the

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witness did not state *when* the sayings were made, or whether made *while* Reuben M. was in *possession* of said negroes.

5th. Objected to the charge of the Court, that if they believed any of plaintiffs were barred by Statute of Limitations, they could find *against* them and *for* those who were *not barred*, proportionably.

The Jury found *for* four plaintiffs, saying nothing about the other four.

Counsel for defendant moved for a new trial, on the foregoing grounds, and because the finding was against the weight of evidence, and against Law and Equity, and that the Jury had not noticed part of the plaintiffs. This motion was overruled, and defendant excepted.

On the fourth day after the trial, the Court allowed the Jury to be re-impannelled, to come in and amend their verdict, after the same had been recorded, to which counsel also excepted.

HARMAN and CHAPPELL, for plaintiff in error.

GIBSON, for defendants.

By the Court.—WARNER, J. delivering the opinion.

On the trial of this cause in the Court below, several exceptions were taken to the decision of the Court, which will be noticed in the order the same appear on the record.

[1.] First, the plaintiff below offered in evidence, a paper purporting to be a certified copy of the last will and testament of Thomas Cleaton, of Mecklenburg County, State of Virginia, which was objected to by defendant, on the ground that there was no copy of the *probate* of the will; which objection was overruled, and the paper admitted in evidence.

The County Clerk of Mecklenburg County certified, that on the 10th day of March, 1818, the last will and testament of Thos. Cleaton, deceased, was *presented into Court, and proven by the oaths of the witnesses thereto, and ordered to be recorded*, and that two of the executors qualified, and gave bond and security, as the law directs, and that certificate is granted them, for obtaining *probate* of said will in due form.

In this State, we think it to be the better practice to have the

probate of the will in *writing*, and the same entered on the minutes of the Court of Ordinary; but in the State of Virginia, it appears, that the certificate of the Clerk of the County Court, that the will has been admitted to *probate* and *record*, is sufficient. See *Tucker's Blackstone*, vol. 1, 418. According to the Act of Congress, of 26th May, 1790, the records and judicial proceedings of the State of Virginia, are to have such faith and credit given to them in the Courts of this State, as they have, by law or usage, in the Courts of that State, from whence the records are taken. *Prince*, 221. Inasmuch as the certificate of the Clerk, as to the *probate* of the will, would have been sufficient to have admitted it in evidence in the Courts of Virginia, the Court below did not err in giving the same faith and credit to it, when offered in evidence in the Courts of this State.

[2.] The second objection made to the admissibility of the certified copy of Thomas Cleaton's will is, that the record was not properly authenticated, according to the Act of Congress, of 26th May, 1790. The Act of Congress declares, that "the records and judicial proceedings of the Courts of any State, shall be proved, or admitted in any other Court within the United States, by the attestation of the Clerk, and the seal of the Court annexed, (if there be a seal,) together with the certificate of the Judge, Chief Justice, or presiding Magistrate, as the case may be, that the said attestation is in due form." *Prince*, 221. Here, the certificate of the Clerk is to a record from the *County Court* of Mecklenburg County. The certificate of Abram Keen certifies, that he is the presiding Magistrate of the *County* of Mecklenburg, but does not certify that he is the presiding Magistrate of the *County Court* of Mecklenburg, from whence the record purports to have come. Now, it is true, that the presiding Magistrate of the County of Mecklenburg may be the presiding Magistrate of the *County Court* of Mecklenburg County, but the certificate does not *affirmatively state that fact*; and the Act of Congress, in our judgment, requires that the certificate should be from the presiding Magistrate of the *particular Court* from which the certified copy of the record is taken, and that fact should *affirmatively appear* on the face of the certificate. We, therefore, are of the opinion, this objection ought to have been sustained by the Court below.

[3.] The third exception taken, is to the admissibility of a re-

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script given by Reuben M. Rainey, to the executors of Thomas Cleaton, for one of the negroes in controversy, dated 16th March, 1818, and witnessed by Edward Travis. It appeared, on the trial, that Travis, the subscribing witness, was living in the State of Tennessee. The defendant objected to the receipt being read in evidence, until its execution was proved, by proving the handwriting of the subscribing witness, it appearing he resided beyond the jurisdiction of the Court. The objection was overruled, on the ground that the execution of the receipt was sufficiently proved by one witness, who stated, "he felt confident that Reuben M. Rainey signed the same, and was also confident that the signature of the witness thereto was genuine." The rule is well settled, that where a subscribing witness to an instrument resides without the jurisdiction of the Court, the execution of the instrument may be proved, by proving the handwriting of the witness. This is a relaxation of the old rule, which required the subscribing witness to be examined by commission, if living; and residing abroad. *Barnes vs. Tromponsky*, 7 Term R. 262. *Watts vs. Kilburn*, 7 Ga. Rep. 366. Although we do not hold that this receipt was admissible in evidence, on the ground that its execution was duly proved, yet we think it was properly admissible in evidence, on the ground that it was more than thirty years old, and, therefore, its execution need not have been proven at the trial. In admitting written documents in evidence, when more than thirty years old, the Courts do not go altogether upon the presumption, that the subscribing witnesses are presumed to be dead, but they adopt that limit of time, as a rule of practical convenience, beyond which proof of the execution of written instruments will not be required, although the subscribing witnesses may be alive. 1 *Starkie's Ev.* 343. In *Doe vs. Burdett*, (31 Eng. Com. Law Rep. 18,) Lord Denman said, "the will is more than thirty years old, and, therefore, proves itself, without calling any witnesses, even were they all alive." See *Doe vs. Walley*, 15 Eng. Com. Law Rep. 150, and *Jackson vs. Christman*, 4 Wend. Rep. 282, to the same point. The receipt is shown to have come out of the hands of the individual to whom it was originally given, and who was properly entitled to the custody of it, and ought to have been admitted in evidence, without proof of its execution by the subscribing witness, being more than thirty years old.

[4.] The next objection is to the admission of the sayings of

Reuben M. Rainey, as testified to by Catharine Rainey. This witness stated, "she had often heard Reuben M. Rainey say, that the slaves, Minerva and Stephen, were brought from Virginia, and were given to Reuben M. Rainey's wife and children, by his wife's father, Thomas Cleaton, and could not be sold for Reuben M. Rainey's debts, or in any other way for said Rainey's benefit."

It does not appear at *what time* these declarations of Reuben M. Rainey were made, and in that view of the question, they were clearly illegal, as was ruled by this Court in *Carter vs. Buchanan*, 3 *Kelly*, 519, '20. The defendant in error, however, concedes that the declarations of Reuben M. Rainey were improperly admitted in evidence, but insists that there is sufficient evidence, on the part of the plaintiff below, to sustain the verdict, without the evidence of Catharine Rainey. The great question in issue between the parties on the trial was, whether the slave, Minerva, went into the possession of Reuben M. Rainey, as a gift, *before* the death of Thomas Cleaton; or whether he obtained possession of the slave *after* the death of Cleaton, under his will? Upon this point, the testimony is so much in conflict, that it is very difficult to determine on which side is the weight of the evidence.

[5.] The illegal evidence as to the sayings of Reuben M. Rainey, having been admitted by the Court as *competent* evidence, to the Jury, to determine that issue, *might*, and in all probability did, decide the question in favor of the plaintiffs. We cannot say, that the Jury were not influenced by the testimony of Catharine Rainey; and where illegal testimony has been admitted, which not only might, but most probably did, influence the mind of the Jury, a new trial ought to be granted. *Marquant vs. Webb*, 16 *Johns. Rep.* 89.

[6.] The next objection is, to the charge of the Court to the Jury. The defendant relied on the Statute of Limitations, and the Court charged the Jury, that they could find a verdict in favor of such of the plaintiffs as they might believe not to be barred by the Statute of Limitations, and against those whom they might believe to be barred by the Statute. It appears from the record, that some of the plaintiffs had been of age long enough to be barred by the Statute, and that some of them had not been of age a sufficient period of time, for the Statute to operate as a bar. The

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charge of the Court was in accordance with the rule established by this Court, in *Thornton vs. Jordan*, decided at the last term in Milledgeville, and, therefore, constitutes no ground of error. It appears from the record, that the Jury found a verdict for four of the plaintiffs only, and did not find a verdict either for or against the other four—there being eight plaintiffs. The Jury ought to have returned a verdict, under the charge of the Court, in favor of such of the plaintiffs as were not barred by the Statute of Limitations, and against those who were barred by the Statute. A general verdict is a finding, by the Jury, in the *terms of the issue or issues referred to them*. *Tidd's Practice*, 798. One of the issues referred to the Jury was, as to the right of all the plaintiffs to recover from the defendant, or only a part of them. As this question was submitted to the Jury, it was their duty to have passed upon it. *Brocknay vs. Kinney*, 2 *John. Rep.* 211. *Van Benthuyssen vs. Denett*, 4 *John. Rep.* 214.

[7.] The verdict was imperfect, inasmuch as it did not find all the issues that were submitted. It was as much the duty of the Jury to have found against the plaintiffs who were barred by the Statute, as it was to have found in favor of those who were not barred. The Court, however, after this imperfect verdict had been received and recorded, and the Jury dispersed, four days thereafter, permitted the Jury to re-assemble, and state what they *intended* to find by their verdict, and to amend it accordingly. To allow the Jury, after their verdict had been received and recorded, and they discharged from the farther consideration of the cause, and mingled with the parties, the witnesses, and their fellow-citizens generally; ascertained, perhaps, the wishes of one of the parties, the intention of the witnesses, or the state of public opinion in relation to their verdict—I say, to allow the verdict to be amended, under such circumstances, according to what the Jury might then state it was their *intention* to find, (such intention not appearing on the face of the verdict,) would be a dangerous and mischievous practice. In *Spencer vs. Goter*, (1 *H. Blackstone*, 79,) the Court refused to alter the verdict of a Jury, unless it clearly appears, on the *fact of the verdict*, that the alteration would be agreeable to the intention of the Jury, and that the proper remedy was a new trial. Although no mischief may have resulted to the parties from the amendment of the verdict, in this par-

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ticular case, under the circumstances stated in the record, yet we are unwilling, by our judgment, to establish such a precedent.

Let the judgment of the Court below be reversed, and a new trial granted.

No. 36.—GREEN B. DORSTER, plaintiff in error, vs. GEORGE W. ARNOLD, defendant.

[L.] A plaintiff who has notice of a fatal defect in his declaration, at the appearance term of the appeal, and makes no motion to amend until the second term, and when the cause is before the Jury, is too late, and cannot then amend.

Assumpsit, on appeal, in Coweta County. Decision by Judge HILL, at September Term, 1849.

The plaintiff sued for a bill of lumber, as per bill of particulars. The declaration had two counts, *indebitatus* and *quantum meruit*, and these only. At the first term, plaintiff confessed and appealed. On the appeal trial, it appeared that there was a *special* contract, whereby defendant was to pay off certain *ft. fas. vs.* plaintiff, &c. The Court, on motion, non-suited plaintiff, overruling his motion to amend his declaration, by inserting a count on the special contract, to suit the proof.

The Court, on a motion to reinstate the case and set aside the non-suit, held, that the motion to amend came too late; that plaintiff, at the preceding term, knew of the necessity of this amendment—this being the second term on appeal; to which ruling the plaintiff excepted, and brings this writ of error.

There was no appearance for the defendant in error, and the cause proceeded *ex parte*.

Sims and Burch, for plaintiff in error.

By the Court.—NISBET, J. delivering the opinion.

•We do not question but that the declaration in this case was amendable, and at the time when the motion to amend was made. By the judgment of the Court, we learn that the amendment was refused, upon the ground that the plaintiff had notice of the necessity of the amendment, at the preceding term, and not amending then, he is precluded, by his laches, from amending now. The facts are, that at the first trial term, the plaintiff confessed a judgment for the defendant, with leave to appeal—did enter an appeal—at the appearance term of the appeal, there is no entry in the case, and at the second term of the appeal, when the cause was before the Jury, he moves to amend. I infer that he confessed on the first trial, because his declaration was defective; if so, *then* he had notice of the defect. The same notice operated on him at the appearance term of the appeal, when he was entitled to amend. The character of the notice is not stated. The Court ruled that he had notice. We must presume that it was a sufficient legal notice, and not amending earlier, he is not now entitled.

The judgment be affirmed.

No. 37.—MARY C. BEALL, administratrix, &c. and others, *vs.* WILLIAM H. BEALL and ELISHA H. BEALL, defendants.

- [1.] Bastards may be made legitimate, and capable of inheriting, by an Act of Parliament. The Legislature of Georgia possess the same power.
- [2.] In *England*, the *sovereignty* of the nation resides in the *Government*—in *this country*, the *supreme power* is in the *people*.
- [3.] In *England*, the *omnipotent authority* of the Parliament is the *dernier resort* in all matters of difficulty and importance; in *this country*, the *written Constitution*.
- [4.] The General Assembly in this State has power to make all laws and or-

dinances which they shall deem necessary and proper "for the good of the State," provided they are not repugnant to the Constitution of the United States, the laws of Congress, passed pursuant thereto, public treaties and the Constitution of the State.

[5.] To disregard the laws of the State, is a capital crime against society, and great vigilance is necessary to see to it, that they are equally respected, by those who govern, as well as those who are destined to obey.

[6.] Notwithstanding the Judiciary is the weakest of the three departments of the Government, and is therefore less dangerous to public liberty than either of the other two, still it is both the right and duty of all Courts to declare all Acts void, which plainly and palpably violate the Constitution.

Mr. Elias Boudinot, a distinguished Representative in Congress, rejoiced, that if, from inattention, want of precision, or any other defect, he should do wrong as a legislator, there was a power in the Government which could, constitutionally, prevent the operation of a wrong measure from affecting his constituents.

[7.] An individual's right to his property consists, not only in its present enjoyment, but also its future disposition, and he can be deprived of neither, except for public uses, without his consent.

[8.] Where an Act of the Legislature is passed, legitimatising W and E to A B, their reputed father, and authorising them to inherit from him, his assent will be presumed; more especially when the reputed father lives five years after the law is passed.

[9.] The power of the Legislature to pass an Act, changing the law of descents, as it respects a particular individual, without his consent and against his will, is contrary, not only to the definition of law, "as a rule of civil conduct," applicable to the whole State, but to the genius and spirit of our institutions.

[10.] A private Act of the Legislature, as to its facts and recitals, imports verity, equally with the records of the Courts; still it may be attacked for fraud in its procurement.

[11.] No inheritance can vest, nor any person be the actual, complete heir of another, till the ancestor is dead.

[12.] A husband may, by deed or will, in his lifetime, deprive his wife of the whole of his estate, except dower; so also, he can procure an Act of the Legislature to be passed, limiting her right of inheritance after his death.

[13.] The Legislature in Georgia, and not the Courts, are intrusted with the discretion of determining what laws are promotive of the public morality, or otherwise.

[14.] While it is true, that too much countenance ought not to be given to the indulgence of criminal desire, nor encouragement to the increase of spurious offspring, still that policy may well be doubted which would reject all provision made for illegitimate children, and suffer them to be cast, naked and destitute, upon the world.

Illegitimacy will be viewed with much less favor, in criminal proceedings, than in mere questions of property and succession.

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- [15.] Virginia, and many other States of the Union, have, by Statute, adopted the rule of the Civil, in opposition to that of the Canon and Common Law, whereby ante-nuptial children are legitimated by the subsequent marriage of the parents and the recognition of the father.
- [16.] Courts ought so to construe Statutes of Distribution as would most likely effectuate the intention of the parties, had they died *testate*.
- [17.] Courts and Judges, eminent for their learning, have regarded bastards as having strong claims to equitable protection.
- [18.] There is a growing tendency everywhere, and especially in this country, to relax the ancient rigor of the law in respect to bastards, and to look to the Penal Code, and to the guilty parties, for the prohibition and prevention of fornication and adultery, rather than visit the vengeance of the law upon the innocent heads of the unfortunate offspring. The law, in its humanity, will not deny to those who have been the authors of their disgrace, the power to repair the mischief, as far as they can, by *gift, will or legislative enactment*.
- [19.] The Constitution declares, that the three powers of the Government—viz: the Legislative, Executive and Judiciary—shall be distinct; still the separation is not, and from the nature of things, cannot be *total*.
- [20.] Whether the sanction of the Executive is necessary to an Act, before it can become a law in this State? *Quere*.
- [21.] The Constitution might have conferred upon any one or more of these branches powers, which, in their nature, would more appropriately have belonged to another.
- [22.] In the absence of any provision upon the subject, the power to legitimate bastard children, and to change the rules of inheritance, would belong, necessarily, to the Legislature.
- [23.] The Act of 1843, changing the names of the complainants, and legitimating them, is purely *legislative* in its character—one not prohibited by the Constitution—and which should not only be supported, but construed favorably by the Courts.
- [24.] All departments of the Government should be considered equally honorable, useful and patriotic; neither attempting to disparage, or entertaining any undue sensitiveness or jealousy toward the other, nor suspecting encroachments where none were intended.
- [25.] Measures, exclusively of a *political, legislative or executive* character, are not examinable by the Courts. In *such* case, the remedy for any real or supposed abuse, is solely by appeal to the people, at the elections.
- [26.] The judicial authority is the final and common arbiter, under the distribution of power by the Constitution, of all questions which, from their nature, require and admit of legal investigation and decision. The friends of republican government and public liberty, have uniformly denounced and rebuked, in the strongest terms, the usurpation of judicial powers, by the Legislature or Executive, as constituting the very essence of tyranny and despotic government.

In Equity, in Upson Superior Court. Decision on demurrer, by Judge FLORE. October Term, 1849.

By an Act of the General Assembly of Georgia, assented to 23d December, 1843, "to change the names of certain persons, and to render them legitimate, and capable of inheriting," and by the first section thereof, it was enacted, "that the name of William Hiram Padgett, of the County of Muscogee, be changed to the name of William Hiram Beall, and that the name of Elisha Harvey Padgett, of said County, be changed to that of Elisha Harvey Beall, and that they be legitimatised, and known as the legitimate children of Alpheus Beall, of Upson County, their reputed father, and fully capable of inheriting real and personal estate of the said Alpheus Beall, by virtue of the Statutes of Distribution of this State, and entitled to all the privileges which they would have been, had they been born in lawful wedlock."

In July, 1848, Alpheus Beall died intestate, leaving his wife, Mary C. Beall, and the two children mentioned above. Mary C. Beall obtained letters of administration on the estate. Wm. H. Beall and Elisha H. Beall filed a bill against the administratrix, for distribution. To this bill, a demurrer was filed, on the ground, that the Act legitimatising the complainants, was inoperative and void—

1. Because it violates the absolute rights of Alpheus Beall and Mary C. Beall.
2. Because it is in derogation of the common rights of Alpheus Beall, to have for his heirs his wife and lawful children.
3. Because it is in derogation of the common right of Mary C. Beall, the wife of Alpheus Beall.
4. Because the Act is judicial, and not legislative.
5. Because it is against public policy.
6. Because it is unconstitutional.

The Court overruled the demurrer, and defendants excepted.

O. C. GISSON, for plaintiff in error, cited the following authorities:

1 *Mad. Ch.* 98, 627. 1 *Har. Ch.* 522, '3. 1 *Bl. Com.* 450, 50, 139. *Smith's Com.* 247, '9, 267 to 272, 277 to 286, 478 to 489. *Hale's Com. Law*, (title, "Analysis," page 31, in the last

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of the best.) 242, 274. 4 *Jac. Law Dic.* 153, '4. 2 *Black. Com.* 11, (n. 3.) 247. 2 *Kent*, 263, 268, 276, 173, 263. 4 *Ib.* 372. 1 *Bac. Abr.* 368. *Schley Dig.* 40, 46, 427. 7 *Ga. Rep.* 92. 1 *Kent*, 391, '2. 19 *Wend.* 659.

T. W. GOODE, for defendants in error, cited the following authorities :

2 *Kent.* 176. 1 *Bl. Com.* 459, 91, 41, (note 3,) 125. 2 *Peters*, 317, 318. 5 *Ga. Rep.* 201. 4 *Ga. Rep.* 47. 2 *Black. Com.* 10, 12, 493, 494, 201.

By the Court.—LUMPKIN, J. delivering the opinion.

Alpheus Beall having departed this life, intestate, in July, 1848, administration was granted on his estate, to his widow and relict, Mary C. Beall. In September, 1849, Wm. H. Beall and Elisha H. Beall filed their bill against the said Mary C. in the Superior Court of Upson County—claiming, as the children and distributees of the intestate, two-thirds of his estate. It is admitted that the complainants were born out of lawful wedlock; and their right to the property depends upon an Act of the Legislature, passed in 1843, and which is set forth in the record. By it, the names of sundry persons, in no way connected with each other, are changed, and they are respectively legitimated to their reputed parents.

The first section is in these words : “ *Be it enacted by the Senate and House of Representatives in General Assembly met, and it is hereby enacted, by the authority of the same, That the name of William Hiram Padgett, of the County of Muscogee, be changed to the name of William Hiram Beall; and that the name of Elisha Harvey Padgett, of said County, be changed to that of Elisha Harvey Beall; and that they be legitimatised, and known as the legitimate children of Alpheus Beall, of Upson County—their reputed father—and fully capable of inheriting real and personal estate of the said Alpheus Beall, by virtue of the Statute of Distributions of this State, and entitled to all the privileges which they would have been, had they been born in lawful wedlock.*” *Pamphlet Laws*, p. 176, A. D. 1843.

But for the zeal and ability with which the complainants' right

to recover has been resisted, it would not have occurred to the Court that there was any serious difficulty in this case. As it is, the argument which has been pressed with so much earnestness, shall receive, as it deserves, the most patient and respectful consideration, at our hands.

[1.] We are met upon the threshold of this discussion, with a broad *negation* of the *power* of the *Legislature* to pass laws for the *legitimation* of *bastards*. It is the first time I ever heard this power doubted.

Judge Blackstone says, that a bastard may be made legitimate and capable of inheriting, by the transcendant power of an act of Parliament, and not otherwise. 1 *Bl. Com.* 369.

Has the Legislature of Georgia the same power over this subject, which is possessed by the British Parliament?

This inquiry leads, necessarily, to an examination of the relative powers possessed by the British Parliament and our State Legislature, and the foundations upon which they respectively rest.

[2.] In Great Britain, the theory of Government is, that the *sovereignty* of the nation resides in the Parliament—consisting of King, Lords and Commons. By gradual and immemorial usurpations, it has been completely wrested from the *people*. Hence it is, that English writers speak familiarly of the *omnipotence* of the Parliament. But the order of things here is exactly the reverse of this; the *supreme power* resides in the *people*. There, the government is master of the people; here, the people are masters of the government.

[3.] And notwithstanding we hear so much of the British Constitution—celebrated, as it has been, in the most sublime and elaborate strains—by poets, orators, lawyers and statesmen—as “a noble fabric, raised by the labor of so many centuries, repaired at the expense of so many millions, and cemented by such a profusion of blood—a fabric that has resisted the efforts of so many races of giants”—no such thing as a constitution—properly so called—exists in that kingdom. Like their Common Law, there is no record, *in writing*, of its provisions. The sphere of the various departments of the Government—legislative, judicial and executive—is not accurately defined—the orbit of each clearly delineated—their respective powers and duties known and assigned. *Their* Constitution, instead of being the controller and

guide, is the creature and the dependant of the Parliament. The *omnipotent authority* of the Parliament, instead of the *Constitution*, is the *dernier resort* to which recourse is had, in times and in doctrines of uncommon difficulty and importance; and its power is absolute and uncontrollable, inasmuch as it may alter or change the Constitution itself—such as it is—at pleasure.

But here, we have written Constitutions, both in the Federal Government and the individual States; and these written Constitutions are the acts of the *people*, and not of the *Government*. In these, *their sovereign will* is embodied—and by these, the powers of Government are respectively distributed into three distinct and co-ordinate branches—viz. the legislative, the executive, and the judiciary—all of which are equally bound by duty to their constituents, the people.

[4.] What power, then, have the people of Georgia delegated, in the Constitution, to the Legislature, which enacted the Statute under which William H. and Elisha H. Beall claim? The grant is exceedingly broad: "The General Assembly shall have *power* to make *all* laws and ordinances which *they* shall deem necessary and proper, for the good of the State, which shall not be repugnant to the Constitution." *Art. 1, §22, Prince, 905.*

While I utterly repudiate the opinion of Mr. Jefferson, "that the *ordinary* Legislature may alter the Constitution itself," (*Notes on Virginia, p. 215.*) (except in the mode which the people themselves may prescribe in that instrument—(see *Art. 4, §15, Prince, 913.*)—for this, indeed, would be to clothe republican Legislatures with the *omnipotence* attributed to the British Parliament)—yet, I ask, is it not manifest, that *all* acts of the Legislature are *valid*, which do not violate, infringe or impair the Federal Constitution, the laws of the United States, made pursuant thereto, any treaty made under the authority of the United States, and the Constitution of this State?

[5.] And will not such laws be binding upon any other branch of the Federal or State Government, as well as upon any individual citizen?

If it is not so, then the idea that the *people* are *sovereign*, in this State, is a vain phantom. If the Executive or Judiciary refuse to execute, in good faith, the will of the people, as constitutionally expressed in the Acts of the Legislature, passed in subordination to the Constitution, then, indeed, is the foundation of public tran-

quility, as well as of popular institutions, sapped and undermined. For myself, I must disclaim all such right. The Legislature may pass laws the most absurd and unreasonable—if it be not disrespectful to suppose such a thing—still, if they be *constitutional*, the people have made them the sole and exclusive judges, whether or not they are “for the good of the State.” The Judges are not at liberty to reject them; the Executive is bound to observe and enforce them. “The best laws,” says Vattel, “are useless, if they are not religiously observed. The people,” continues this writer, “ought to watch very attentively, in order to render them equally respected, by those who govern and by the people destined to obey. To disregard the laws of a State, is a capital crime against society; and if those guilty of it are invested with authority, they add to this crime a perfidious abuse of the power with which they are clothed.” *Vattel's Law of Nations*, b. 1, 3, art. 30.

Our conclusion, therefore, is, that the General Assembly had the power to pass this Act. It is one which has been exercised ever since the organization of the State Government, and one which is habitually practised by every State Legislature in the Union. See *Griffith's Annual Law Register*, title, *Bastards*, and *Statutes of Georgia*, *passim*.

[6.] But it is argued that this Act is unconstitutional. If this be clearly so, then, notwithstanding it may be true, as asserted in the *Federalist*, that “the Judiciary is, beyond comparison, the weakest of the three departments of power—that it can never attack, with success, either of the other two, and all possible care is requisite to enable it to defend itself against their attacks”—(No. 78)—or, in the language of Montesquieu, “of the three powers—the legislative, executive, and the judiciary—the judiciary is next to nothing”—(*Spirit of Laws*, vol. 1, p. 186)—still, I repeat, if this Act is a plain and palpable violation of the Constitution, this Court has the power, and it becomes its imperative duty, to declare it so. Nor is the power of passing upon the constitutionality of a State Statute, restricted to this branch of the Judiciary. It necessarily belongs to every grade of magistracy—from the highest to the lowest; nay, municipal corporations, when exercising judicial functions, are vested primarily with this power: *Indiana &c. Turnpike vs. Phillips*, 2 Pennsylv. 184. *Moore vs. Houston*, 3 S. & R. 169. *People vs. Foot*, 19 Johns. 58. *Ex parte*

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McCollum, 1 *Cowen*, 550. *Vanuxem vs. Hoglechersts*, 1 *South*. 192. *Olden vs. Hallet*, 2 *South*. 466. *Whittington vs. Polk*, 1 *Har. & J.* 236. *Norris vs. Trustees of Abingdon Academy*, 7 *Gill. & Johns*. 7. *Crane vs. McGinnis*, 1 *Gill. & Johns*. 463. *Derby Turnpike Company vs. Parks*, 10 *Conn.* 522. *Goshen vs. Stonington*, 4 *Conn.* 225. *Hill vs. Sunderland*, 3 *Vermt.* 507. *Starr vs. Robinson*, 1 *Chip.* 257. *Dupy vs. McKinnie*, 1 *Chip.* 237. *Stanford vs. Barry*, 1 *Aik.* 314. *Woart vs. Winnick*, 3 *N. Hamp.* 473. *Dow vs. Norris*, 4 *N. Hamp.* 16. *Piscataqua Bridge vs. N. H. Bridge et al.* 7 *N. Hamp.* 65, 66. *Lunt's Case*, 6 *Greenl.* 412. *Bowdoinham vs. Richmond*, 6 *Greenl.* 112. *Lewis vs. Webb*, 3 *Greenl.* 326. *Durham vs. Lewiston*, 4 *Greenl.* 140. 2 *Peters*, 522. 12 *Wheat*. 270. 3 *Dall.* 386. 2 *Dall.* 309. 4 *Dall.* 18. 6 *Cranch*, 128. *Charlt.* 175. *Ib.* 235. *Walker*, 146. 1 *Blackf.* 206. 1 *Breese*, 70, 209. 2 *Porter*, 302. 1 *Marsh.* 290. 2 *Litt.* 90. 4 *Monroe*, 43. 5 *Hayw.* 271. *Cooke*, 217. 4 *Yerg.* 202. 9 *Ib.* 490. 3 *Desauss.* 476. 1 *McCord*, 238. *Harp.* 385. 1 *Hayw.* 28. 1 *Marp.* 58. 6 *Rand.* 245. 1 *Va. Cases*, 20. 1 *Binn.* 419. 2 *Yeates*, 493. 5 *Binn.* 355. 11 *Mass. R.* 396. 13 *Pick.* 60. 15 *Mass. R.* 407. 7 *Pick.* 466.

The right here asserted, is a necessary attribute of every Court in the country, as will appear from the fact, that if there happens to be an irreconcilable variance between the Constitution—which is the fundamental law—and a particular Act proceeding from the legislative body, that which has the superior obligation and validity, ought, of course, to be preferred; in other words, the Constitution ought to be preferred to the Statute—the intention of the people, to the intention of their agents. Nor does this conclusion, as is shown in the work first above cited, by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the Legislature, declared in *Statutes*, stands in opposition to that of the people, declared in the *Constitution*, the Judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than those which are not fundamental. If two Statutes clash, the Courts decide that the last in order of time shall control; and if the will of the original and superior authority interferes with that of the derivative and inferior, nature and reason alike teach, that the

latter must yield ; and, accordingly, that it will be the duty of *every* judicial tribunal in the land, to adhere to the Constitution, and disregard a particular Statute that contravenes it.

The following apposite remarks are from Mr. *James Wilson*, formerly one of the Associate Justices of the Supreme Court of the United States :

“ In this country, the legislative authority is subjected to the control arising from the Constitution. From the Constitution, the legislative department, as well as every other part of the Government, derives its power ; by the Constitution, the legislative, as well as every other department, must be directed ; of the Constitution, no alteration by the Legislature can be made or authorized. In our systems of jurisprudence, these positions appear to be incontrovertible. The Constitution is the supreme law of the land. To that supreme law, every other power must be inferior and subordinate.

“ Now, let us suppose, that the Legislature should pass an Act manifestly repugnant to some part of the Constitution, and that the operation and validity of both should come regularly in question, before *any* Court. The business and design of the judicial power is, to administer justice, according to the law of the land. According to two contradictory rules, justice, in the nature of things, cannot possibly be administered. One of them must, of necessity, give place to the other. Both, according to our supposition, come regularly before the Court, for its decision on their operation and validity. It is the right, and it is the duty, of the Court, to decide upon them. Its decision must be made, for justice must be administered, according to the law of the land. When the question occurs—What is the law of the land?—it must also decide this question. In what manner is this question to be decided ? The answer seems to be a very easy one. The supreme power has given one rule—a subordinate power has given a contradictory rule ; the former is the law of the land ; as a necessary consequence, the latter is void, and has no operation.

“ This is the necessary result of the distribution of power, made by the Constitution, between the Legislature and the judicial departments. The same Constitution is the supreme law to both. If that Constitution be infringed by one, it is no reason that the

infringement should be abetted, though it is a strong reason that it should be discountenanced and declared void by the other.

"The effects of this salutary regulation, necessarily resulting from the Constitution, are great and illustrious. In consequence of it, the bounds of the legislative power—a power the most apt to overleap its bounds—are not only distinctly marked in the system itself, but effectual and permanent provision is made, that every transgression of those bounds shall be adjudged and rendered vain and fruitless. What a noble guard against legislative despotism!

"This regulation is far from throwing any disparagement upon the legislative department. It does not confer upon the judiciary a power, superior in its general nature, to that of the Legislature; but it confers upon it, in particular instances, and for particular purposes, the power of declaring and enforcing the superior powers of the Constitution—the supreme law of the land.

"This regulation, when considered properly, is viewed in a favorable light by the Legislature itself: 'It has been objected,' said Mr. Boudinot, a learned and distinguished member of Congress, 'that by adopting the bill before us, we expose the measure to be considered and defeated by the Judiciary, which may adjudge it to be contrary to the Constitution, and therefore void, and not lend their aid to carry it into execution. This gives me no uneasiness. I am so far from controverting this right in the Judiciary, that it is my boast and my confidence. It leads me to greater decision on all subjects of a constitutional nature, when I reflect, that if, from inattention, want of precision, or any other defect, I should do wrong, there is a power in the Government which can constitutionally prevent the operation of a wrong measure from affecting my constituents. I am legislating for a nation, and for thousands yet unborn; and it is the glory of the Constitution, that there is a remedy for the failures even of the Legislature itself.'" *Wilson's Lectures on Law*, 1 vol. 460, '1, '2, '3.

I could multiply quotations to the same effect, to any extent, from Judge *Tucker*, in his Appendix to Blackstone—Mr. Justice *Woodbury*, in *Merrill vs. Sherburne*, 1 *N. Hamp. Rep.* 199—and many others of the ablest and soundest constitutional jurists and statesmen that have adorned our country. But these, I hope, will suffice to place this delicate and important principle in its true

and proper light. Assuming, then, that it is both our right and duty, to pronounce this Act void, provided it manifestly appears to be *unconstitutional*, we ask, wherein is it obnoxious to this objection?

[7.] We fully recognize the principle insisted upon with so much earnestness, by counsel for the plaintiff in error—that the property of Alpheus Beall cannot be taken from him and given to another, without his consent and against his will; and that his right to it consists not only in its enjoyment during his life, but to its future disposition, after his death. But we respectfully submit, that this is not the question presented for our adjudication. For, conceding that the assent of Alpheus Beall was necessary, *constitutionally*, to the efficacy of this Act—or, as a condition precedent to its taking effect—still, a becoming respect for the other two co-ordinate departments of the Government, would compel us to *presume* that such assent was given.

[8.] And this legal presumption is greatly strengthened, in the present case, from the fact, that Alpheus Beall lived *five years* after this Statute was passed, and took no steps, so far as we are informed from the evidence before us, to defeat it, either by attacking it directly for fraud in its procurement, or making such testamentary disposition of his estate, as would counteract or thwart its provisions. Again, the general rule, now universally adopted by the Courts, of inferring consent to an Act like this, is the more justifiable in this State, where all Acts and Ordinances are held and made *public laws*; and the several Courts of Law and Equity in this State, (*a fortiori*, individuals?) are bound to notice them as such. *Prince*, 215.

[9.] Indeed, the Supreme Court of North Carolina have intimated, that the Legislature have the power to enact such a law as this, without the consent of the reputed father, express or implied. Chief Justice *Ruffin*, in *Perry et al. vs. Newsom*, (1 *Iredell's Eq. Rep.* 28,) says, "We do not mean to say, positively, that the Legislature cannot make one who is out of the line of descents, succeed to an ancestor, instead of him who would be heir according to the general law. Perhaps, if the power of disposition by the ancestor in his lifetime, be not restricted, and as the law gives the *capacity* to inherit, it may not be beyond the power of the Legislature, by even a private law, passed before

the death of the owner, to annul the capacity of one person to succeed, and confer it on another."

I should seriously question the power of the Legislature to pass a private Act, changing the law of descent, as it respects one individual of the community, without his consent, when it left all the rest of the citizens of the State unmolested by its operation. Such an Act, in my humble judgment, to be valid, must be on petition of the party, or by his consent, express or implied. The Constitution, it is admitted, authorizes the Legislature to pass *all laws*; but one of the essential elements of *law* is, it must be *general*—a *rule* prescribed for the civil conduct of the *whole community*, and not a transient *order* from a superior, to or concerning a *particular person*. 1 *Bl. Com.* 44. Under our institutions, all men are considered as equal, and the same laws should apply alike to all. If it be fit and proper that one individual's property should descend in a particular way, then it is equally so, that every other individual's should descend the same way. This is the very genius and spirit of our system; and were the Legislature to single out an individual and declare, that, dying intestate and wanting lineal descendants, his *uncles*, instead of his *cousins*, should inherit his estate, but that in every other case the *cousins* should be the next collateral heirs, we should be strongly inclined to hold, that this was *not law*, for the reason already assigned.

[10.] Here, however, this objection does not exist; for we hold, that *as to the facts* in this case, every Court must receive them as importing verity, to the same extent that the records of the Court are evidence to the Legislature, or another Court, of the matters of fact transacted in the Court, and of which the record is the memorial; and although not *conclusive*, they are to be treated as true, until the contrary appear. 4 *Dev. L. Rep.* 110, *Drake et al. vs. Drake et al.* I am equally clear, however, that such an Act may be relieved against, upon the ground of false suggestion and fraud. This is the doctrine, undoubtedly, of the English Courts, as to private Acts of Parliament, notwithstanding its plenary powers.

[11.] So much, then, as to the interest of Alphous Beall, himself, in his property, present and prospective. It is argued, however, that the marital rights of his wife attached, and that these cannot be curtailed by this Act, without *her* consent. *Nemo est heres viventis*—no one can be heir during the life of his ancestor—

is the familiar maxim of the Common Law. *Co. Litt.* 22, b. "By law," says Mr. *Broom*, in his comments upon this maxim, "no inheritance can vest, nor can any person be the actual, complete heir of another, till the ancestor is previously dead; before the happening of this event, he is called heir apparent, or heir presumptive; and his claim must necessarily be to an estate which remained in the ancestor, at the time of his death, and of which he has made no testamentary disposition; so that it is subject to be defeated, by the superior title of an alienee in the ancestor's lifetime, or of a devisee under his will." *Broom's L. M.* 223. 2 *Bl. Com. by Stewart*, 231. *Co. Litt.* 8, a. 1 *Steph. Com.* 358.

[12.] If, then, Alpheus Beall could, by *deed* or *will*, in his lifetime, have deprived his wife of the *whole* of his estate, except dower, is it not clear, that he could procure an Act of the Legislature to be passed, which would limit her to one-third of it, *by descent*, after his death?

[13.] Again, this Statute is attacked upon the high and lofty principles of honor and morality; and authority is not wanting for this notion. Lord *C. B. Gilbert* places the exclusion of bastards from the feudal succession, upon this ground: "The Lords," says he, "would not be served by any persons that had that stain on their legitimation, nor suffer such immoralities in their several clans." *Gilbert on Tenures*, 17. *Heineccius*, in his *Dissertation de Legis Notæ Macula*, states that they are excluded from the inheritance in Germany, and bear the mark of disgrace—*semper levi nota adspersi fuisse videntur*; and the writer bestows a highly wrought eulogium upon this branch of Germanic jurisprudence.

Our answer to this position, however, is, that the *people* of Georgia, in their written Constitution, have seen fit to intrust the *General Assembly*, and not the *Judiciary*, with the discretion of determining whether or not this kind of legislation is promotive of the public morality, or, in other words, is "*for the good of the State*;" and should we, as we have been so solemnly and eloquently urged to do, assume jurisdiction over a subject that, in the distribution of power, has been committed to another department of the Government, the question might well be propounded to us, which was addressed to Moses, by the Hebrew, "who made thee a judge" in this matter? And I apprehend, we should

find it greatly more difficult to return a satisfactory answer, than did the divinely-called and commissioned leader of the Israelites.

[14.] But were it otherwise—were this an open question, to be settled by the *Courts*, instead of the *Legislature*, much might be said in favor of the policy pursued by the reputed father of these complainants; for, while on the one hand, too much countenance ought not to be given to the indulgence of criminal desire, or encouragement to the increase of spurious offspring, still that policy may well be doubted, which would reject all provision made for children thus unfortunately circumstanced, and suffer them to be cast, naked and destitute, upon the world. In the case of the *Marchioness of Annandale vs. Anne Harris*, (2 P. Wms. R. 432,) where the Marquis of Annandale, in his lifetime, had unlawful familiarities with Anne Harris, who was before a modest woman, but the Marquis seduced her, and had a child by her, and gave a bond to her for the payment of £2000, within a year after his death, for her use and benefit, as well as that of the child, and his widow having brought her bill in Equity, to be relieved against the deed, as gained upon unlawful and wicked consideration, Lord Chancellor King said, "If a man does mislead an innocent woman, it is both reason and justice, he should make her a reparation; but this case is stronger in respect of the innocent child, whom the father has occasioned to be brought into the world in this shameful manner, and for whom, in justice, he ought to provide." And Chancellor Kent, in referring to this language, speaks of it as "much more conformable to justice and humanity," than some of the "hard" decisions which had preceded it. 2 Kent's Com. 217.

In *Beachcroft vs. Beachcroft*, (1 Mad. Rep. 430,) the testator died a bachelor, leaving five natural children by an East Indian woman. He bequeathed, by his will, £5000 to each of his children, and 6000 Sicca rupees to the mother of his children. There was no other description of the legatees in the will. It was allowed to be proved, *dehors* the will, that the testator had recognized them as his children, and had sent three of them to England for an education. The legacies were decreed to them.

The point in *Gardner vs. Heyer*, (2 Paige, 11,) was, whether the four natural children of the testator—one son and three daughters—should take as legatees under his will? And Chancellor Walworth thus expresses himself, "If there is not some

subverting rule of law, which makes it the duty of the Court to punish the innocent and unoffending offspring for the sins of their parents, I do not see how these legatees can be deprived of the property which was intended to be given them by the testator."

[15.] The Legislature of Virginia, in 1785, passed an Act, which is now incorporated in the Revised Code of that State, and which has been adopted in a large portion of the Union, recognizing the rule of the Civil Law, in opposition to the Canon and Common Law, namely: that ante-nuptial children are legitimated by subsequent marriage, and the acknowledgment of the children by the father.

A question arose, under the Virginia Act, in *Stones vs. Keeling*, (note to *Rice vs. Eppard*, 3 Hen. & Munf. 228,) when the Court seemed to think, that *illegitimacy* was to be viewed very differently, where matters of property and succession were concerned, than in criminal prosecutions; and that, notwithstanding any legal bar, the law ought, in the former case, to receive the most liberal construction, "it being undoubtedly the design of the Legislature to establish the most liberal and extensive rules of succession to estates, in favor of all in whose favor the intestate himself, had he made a will, might have been supposed to be influenced; and here, there can be no doubt, had he died *testate*, that these (*natural*) daughters would have been the first objects of his care."

[16.] I ask, can there be a doubt, but that if Alpheus Beall had died *testate*, that he would have preferred that *two-thirds* of his estate should have gone to these complainants, who, although illegitimate, are, nevertheless, descended from his loins—bone of his bone, and flesh of his flesh—than that the *whole* should, through right of inheritance, or by will from his widow, have passed over to *her* next of kin, who are strangers to his blood? If this be so, then this Statute should receive the most beneficial construction in behalf of these complainants. 2 Fomb. 124.

I am fully warranted in this assertion, by the facts set forth in the following extract from the complainants' bill, and which, by the demurrer, are admitted to be true:

"And your orators charge, that sometime before the death of said Alpheus Beall, (near twelve months,) he wrote a letter to Frederick Beall, his brother, at Lumpkin, Stewart County, to come and see him; that said Frederick did come to Thomaston, in pursuance of the request, and when the said Alpheus Beall met

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his brother, and took him by the hand and cried like a child, and after becoming calm and composed, he told Frederick, that he had sent for him to write his will, and wanted to bequeath to his said wife, Mary C. Beall, what property she brought with her; at the marriage, (a negro woman, Sukey, and some other articles of not much value,) to his wife, absolutely, and that all of his own property, raised and realized by his own efforts and industry, he wished disposed of so as to give a lifetime estate of one-third to his wife, the remainder to your orators, forever, share and share alike, and the third given his wife for life, to revert back, at her death, and go to, and become the property of, your orators, forever, in equal proportions; that said Frederick Beall advised him to make no will, but leave the matter where the law would take it, and distribute one-third to the wife, the other two-thirds to your orators, absolutely, to which said Alpheus Beall consented reluctantly.

"Your orators charge, that Frederick Beall is now deceased; but your orators charge, that all these things that passed between said Alpheus Beall and his said brother, were known to said Mary C. Beall."

[17.] Judge Tucker, in delivering the opinion of the Court in *Sleigh vs. Shider*, (5 Call's Rep. 439,) speaks of a similar law to that which we are considering, as having done all it could "to protect and provide for the innocent offspring of indiscreet parents."

In the case of *Pratt's Lessee vs. Flamer et al.* (5 Har. & Johns. 10,) the Court say, "Where can be the justice or policy in punishing the innocent offspring for the criminal, illegitimate intercourse between their parents! Their situation is deplorable enough, without being deprived of the pecuniary aid of those who brought them, disgracefully, into existence. It is difficult to discern what principle of policy it is, that will enable the father of illegitimate born children, to provide for those who have lived long enough to acquire a reputed name, that will exclude him from making provision for the child that is unborn, and who, when it comes into existence, will stand more in need of his assistance. Let the policy of the English Courts have been what it might in the reign of Elizabeth, it has long ceased to be the policy of Maryland, to have natural children unprovided for; on the contrary, the subsequent marriage of the parents, legitimates the

prior born children; and if the father is so unnatural, as to leave the child unprotected for, he can be forced to do his duty, and compelled to take care of his offspring, although illegitimate."

These quotations will suffice to show, that Courts and Judges distinguished for their ability, have regarded *bastards* as having strong claims to equitable protection; on the other hand, it is due to candor to state, that there are cases where Courts have withheld from them every favorable intendment which the *lawful* heir would have been entitled to, as of course.

[18.] It cannot, I think, however, have escaped the most careless observer, that there is a remarkable tendency to relaxation in the law, every where, in behalf of illegitimate children—to look to the Penal Code, and to the guilty parties, for the punishment and prohibition of *fornication and adultery*, and not to visit the vengeance of the law upon those who are really innocent, notwithstanding they have to trace their birth to a source which is justly deemed criminal, by law and by religion, and to hold, that the law will not interpose to deny to those, who have been the authors of this misfortune, to repair it, as far as they can, by *gift, will or legislative enactment*.

[19.] Lastly, it is contended, that this Statute is *unconstitutional*, because it is a *judicial Act*. The 1st section of the 1st article of the Constitution of the State, declares, that "The legislative, executive and judiciary departments of the Government, shall be distinct, and each department shall be confided to a separate body of magistracy; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances therein expressly permitted." *Prince*, 902.

The separation of the three powers of the Government is not as *total* as the terms of this article would seem to imply.

[20.] Whether the *sanction* of the Executive is necessary to an Act; before it can become a law, I think somewhat doubtful, under the Constitution. It is certain, however, that he can, by his *veto*, arrest an Act, unless passed by two-thirds of each branch of the Legislature. The Executive, then, may be said to be *united* with the Legislature in the passage of laws. The Judiciary is dependent on the Legislature, for the erection of Courts; for the apportionment of jurisdiction; for appointment to office; for compensation, and removal by impeachment. The Executive is

dependent on the Legislature for salary ; for election, in the second instance, and removal by impeachment. This connection and dependence was intended to teach and inculcate kindness and forbearance—as each are, in some degree, checks upon the other.

[21.] The Constitution might have conferred upon any one or more of these departments, powers which, in their nature, would more appropriately belong to another ; and it has done this in one striking instance, viz : in making it the business of the Legislature to originate and try all impeachments of public officers. This is, to all intents and purposes, a *judicial* proceeding.

[22.] In the absence of any specific grant, the power to legitimate bastard children, and to change the rules of descent, would devolve, necessarily, upon the *law-making* power. It may be transferred, by the Legislature, to the Judiciary, as it has been done in North Carolina ; still it belongs, *originally* and appropriately, to the Legislature.

[23.] We entertain no doubt, that this Act is purely of a legislative character, one not prohibited by the Constitution, and which should be supported and construed favorably by the Courts.

[24.] And I gladly avail myself of this opportunity of disclaiming all undue sensitiveness or petty jealousy toward the other co-ordinate departments of the Government. I consider all equally patriotic, honorable and useful. It is natural, though much to be lamented, that jealousies should arise between them, as to the discharge of their respective duties. These should not be readily entertained, and each should divest themselves of every feeling, save that of devotion to the public good. Encroachments should not be suspected where none were intended ; and should it ever become our unpleasant task to do, what we are here importuned to do, namely, set aside a Statute on account of its unconstitutionality, we have an abiding confidence in the liberality of the Legislature, that they will do us the credit to believe, that we acted only in obedience to the sternest convictions of duty.

[25.] In measures exclusively of a *political, legislative or executive* character—as the supreme authority, *as to these*, belongs to the *legislative* and *executive* departments—we shall always refuse, as we now do, to re-examine them here. Their mode of executing these powers, can never properly become the subject of

inquiry and investigation, before this or any other tribunal. In such cases, the remedy for any real or supposed abuse, is solely by an appeal to the people, at the elections.

[26.] But were this or any other question of a different nature, and capable of judicial inquiry and decision, then it would admit of a very different consideration—the action of either of the other departments, whether legislative or executive, being capable, in its own nature, of being brought to a judicial test, is subject to judicial revision. It is, in all such cases, as we conceive, that the judicial authority is the final and common arbiter, provided by the Constitution itself, and to whose decisions all others are subordinate. 1 *Story on the Constitution*, 345, '6, 7.

"It was well known and considered," says Mr. Woodbury, in the New Hampshire case already cited, that "in the distinct and separate existence of the judicial power, consists one main preservative of public liberty. 1 *Bl. Com.* 269. That, indeed, there is no liberty, if the power of *judging* be not separated from the legislative and executive powers. *Montesquieu*, b. 11, ch. 6. In other words, that the union of these two powers is tyranny. 7 *Johns. Rep.* 508. Or, as Mr. Madison observes, may justly be pronounced the very definition of tyranny. *Fed. no.* 47. Or, in the language of Mr. Jefferson, is precisely the definition of despotic government. *Notes on Virginia*, 195."

If the usurpation of judicial power by the other departments, is thus pointedly denounced and rebuked by the friends of free government, we will endeavor cautiously to abstain from any usurpation on our part.

We are, therefore, of the opinion, that the judgment rendered in the Superior Court ought to be affirmed.

Per Curiam.—Judgment affirmed.

No. 38.—JAMES PYRON, plaintiff in error, vs. THE STATE, ex. rel. JOHN H. LOWE, defendant.

[1.] Where a judgment of *ouster* had been awarded against P, on a *quo warranto*, who claimed to hold the office of Clerk of the Court of Ordinary, under an election made in January, 1849, and subsequent to the judgment of *ouster*, P was again elected to the same office by the Justices of the Inferior Court, and exercised the duties of the office under the new appointment exclusively: Held, that P, in exercising the duties of the office exclusively under his new appointment, was not in contempt of the judgment of the Court, on the *quo warranto*, removing him from the office, under the first appointment—the new appointment not having been declared invalid by any appropriate judicial proceedings, instituted for that purpose.

Motion, in Henry Superior Court. Decided by Judge FLOYD, October Term, 1849.

For the facts, see the decision of the Court.

S. T. BAILEY, for plaintiff in error, cited—

1 *Cranch*, 137. 2 *Nott & McC.* 356. 1 *Chit. R.* 709. *Prince's Digest*, 214, 241, 245. 11 *Mass.* 125, 339. *Hotchkiss*, 75, 689, 690. 20 *Pick.* 484. 4 *Bur.* 1964, 2022. *Cole on Crime*, &c. 114, 163, 164. 1 *Dowl. & Ry.* 426. 3 *Bl. Com.* 262. 2 *Strange*, 819, 1198. 3 *Yeates*, 314. 5 *Ad. & El.* 584. *Waik. Dig.* 15, 415, 425, 475, 492.

DÖYAL & NOLAN, for defendant in error, cited—

2 *Wheat. Selw.* 1187, '8, '9. 3 *Porter*, 356. 1 *Blackford*, 166. 2 *Cond. Rep. U. S.* 407. 7 *Wheat.* 38. 9 *John. R.* 396. 4 *Ib.* 317. 6 *Ib.* 337. 5 *Wheat.* 144. *Charlton's Rep.* 136, 315. 2 *Greenl.* 165. *Trial of Smith and Ogden*, 73. 1 *Burr's Trial*, 352. 1 *Breese*, 266. 2 *Virginia Cases*, 408. 1 *Kent*, 300, note b. 8 *Cowen*, 279. 7 *Cranch*, 32. 13 *Wend.* 662. *Coxe*, 287.

By the Court.—WARNER, J. delivering the opinion.

[1.] From the record in this case it appears, that an information, in the nature of a *quo warranto*, was filed at the instance of

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John H. Lowe, against James Pyron, requiring the latter to show by what authority he claimed to exercise the duties of the office of Clerk of the Court of Ordinary of Henry County. John H. Lowe, in his petition for the *quo warranto*, alleges, that he was duly elected Clerk of the Court of Ordinary of said County, on the second Monday in January, 1847, and was re-elected to said office on the second Monday in January, 1849. On hearing the *quo warranto*, the Superior Court of Henry County gave judgment of *ouster* against Pyron, who claimed to hold the office by virtue of an appointment made on the second Monday in January, 1849. The judgment of *ouster* was rendered by the Superior Court of Henry County against Pyron, upon the ground that *he was not elected according to law*.

To this judgment of *ouster* on the *quo warranto*, there was no exception taken, as appears from the record.

The judgment of *ouster* against Pyron, was rendered at the April Term of Henry Superior Court, 1849. On the 17th day of September, thereafter, a rule *nisi* was granted, requiring Pyron to show cause, at the next October Term of that Court, why he should not be attached for contempt of the order and judgment of the Court, which declared his appointment void, and ousted him from his said office of Clerk of the Court of Ordinary. The contempt alleged in the rule *nisi* was, that he had continued to exercise the duties of the office, notwithstanding the judgment of *ouster*. To this rule *nisi*, Pyron, the respondent, showed for cause, that he did, in obedience to the order for his removal from office, thenceforward cease to exercise any of the duties, privileges or immunities of said office of Clerk of the Court of Ordinary, until the 20th day of April, 1849, and until his *subsequent* election to said office by the Justices of the Inferior Court of Henry County, and until his due and legal qualification under said last election.

The respondent annexes, as a part of his showing, an order of a majority of the Justices of the Inferior Court of Henry County, appointing him Clerk of the Court of Ordinary of that County, on the 20th day of April, 1849; said order reciting that, the office of the Clerk of the Court of Ordinary for Henry County had become *vacant*. The return of the respondent was verified by his affidavit, and does not appear to have been controverted. Upon the hearing the motion, the Court decided, that the respond-

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ent was in direct contempt of the order of the Court, passed at the April Term, 1849, removing him from the said office of Clerk of the Court of Ordinary; and it was farther ordered by the Court, that Pyron, the respondent, turn over to the Clerk holding a commission dated 1847, to wit: John H. Lowe, said office of the Court of Ordinary, and all the books and papers appertaining thereto, and that the said Pyron pay the costs of this proceeding; and upon his failure to comply with this order, it was farther ordered, that an attachment absolute issue against him; whereupon Pyron, the respondent, excepted.

The only question made for our judgment upon this record is, whether Pyron, the respondent, was in *contempt* of the order or judgment of the Court, ousting him from his office, held under his *first* appointment, made on the second Monday in January, 1849. It does not appear that the judgment of the Superior Court of Henry County, upon the *quo warranto* ousting Pyron from office, decided any thing in relation to the *validity* of the election of John H. Lowe, in January, 1849; as to that question, the record is silent, and we infer, that the Court below did not consider that question as decided, from the fact that, in the last judgment holding Pyron to be in contempt, the books and papers appertaining to the office, are ordered to be turned over to John H. Lowe, the Clerk holding a commission dated in 1847.

The judgment of the Court, upon the hearing of the *quo warranto*, was, that Pyron be removed from office, upon the ground *he was not elected according to law*. The only election of Pyron to the office of Clerk of the Court of Ordinary of Henry County, embraced by this judgment, was the one had on the second Monday in January, 1849. The validity of no other election of Pyron was in issue before the Court on the hearing of the *quo warranto*.

The answer of the respondent to the rule nisi explicitly states, that in obedience to the order of the Court for his removal from office, he did thenceforward cease to exercise any of the duties, privileges or immunities of the said office, until the 20th day of April, 1849, and until his *subsequent* election to said office, by the Justices of the Court of Ordinary of said County of Henry; that pursuant to said *last* election and qualification, under the judgment and authority of said Justices of the *Inferior* Court, so appointing him Clerk as *aforesaid*, he has exercised the duties,

privileges and immunities of Clerk of the Court of Ordinary of said County, and *none other*. The respondent's answer is supported by the judgment of a majority of the Justices of the Inferior Court of Henry County, declaring the office *vacant*, and that an election be had for Clerk of the Court of Ordinary, which was held, and Pyron, the respondent, declared to have been duly elected, was qualified, and gave bond and security.

This answer of the respondent does not appear to have been *controverted*, and, in our judgment, he fully purged himself of any contempt of the order of the Court on the *quo warranto*. He never exercised the duties of the office of Clerk of the Court of Ordinary, under the appointment which the judgment of the Court, on the *quo warranto*, declared to have been illegal, subsequent to the rendition of that judgment, but under a *new* and *distinct* appointment from that which the Court, by its judgment, had vacated upon the hearing of the *quo warranto*.

The latter election was, *prima facie*, valid—the *facts* necessary to authorize an election by the Justices of the Inferior Court appearing on the face of the order made therefor.

By the Act of 1820, it is made the duty of the Justices of the Inferior Court, or a majority of them, when any *vacancy* happens in the office of Clerk of the Court of Ordinary, by death, resignation or otherwise, to proceed, without delay, to appoint some fit and proper person to fill such vacancy. *Hotchkiss*, 690. The order of the Inferior Court of Henry County, ordering the election on the 20th April, 1849, recites, that there is a *vacancy* in the office, and that the Court proceed, without delay, to fill such vacancy; whereupon, Pyron, the respondent, was declared duly elected.

It is in virtue of this *last* election, and under the authority thereof, and *none other*, that the respondent was exercising the duties of the office of Clerk of the Court of Ordinary of Henry County; according to the answer of respondent, consequently, he was not acting under the authority of, or by virtue of the appointment made in January, 1849, which the Court, by its judgment on the *quo warranto*, declared to have been illegal. The election of the 20th April, 1849, was not adjudicated by the Court, on the *quo warranto*—the validity of that election was not embraced in that judgment, therefore the exercise of the duties of the office of Clerk, under the *new* appointment, was no con-

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tempt of the judgment of the Court, ousting the respondent from office, under the *first* appointment. Whether the election of Lowe, on the second Monday in January, 1849, was a valid election, or whether the election of Pyron, on the 20th April, 1849, was a valid election, we express no opinion. We leave those questions entirely open, to be determined whenever the proper proceedings shall be instituted to inquire into the validity thereof. What we now decide is, that according to the uncontroverted answer of the respondent to the rule *nisi*, calling upon him to show cause why he should not be attached for contempt of the judgment of the Court on the *quo warranto*, he was not in contempt of that judgment, by exercising the duties of the office under his *new* appointment, which has never been *judicially* declared to have been *invalid*, by any appropriate proceeding for that purpose.

Let the judgment of the Court below be reversed.

No. 39.—DOE, on the demise of JOSEPH S. WORTHY *et al.* plaintiffs in error, vs. ROE, casual ejector, and JOHN HAMES, tenant, defendant, &c.

[1.] A sale of lands, under a judgment against an executor, *de bonis testatoris*, conveys a good title to the purchaser, and the title of the heirs is divested.

Ejectment, in Troup Superior Court. Decision at November Adjourned Term, 1849, by Judge HILL.

This was ejectment for title, (and *mesne* profits,) by the heirs at law of Thomas Worthy against John Hames, for a lot of land, owned by Worthy at his death.

It was admitted in the bill of exceptions, that Worthy owned the land at his death; that it was levied on and sold by virtue of a *f. fa.* vs. his executor and executrix, in the usual form, "to be

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levied of the goods and chattels, *lands* and tenements of said Thomas Worthy, to be administered by them."

The only point made was made by plaintiffs, that the title to *the land* of the heirs of Worthy, was not divested by the said Sheriff's sale, which the Court overruled; whereupon, plaintiff's counsel confessed judgment, reserving the right to except to said decision, which was then and there done, and thus the case comes up.

JOHN L. STEPHENS, for plaintiff in error.

B. H. HILL and BULL, for defendants.

By the Court.—NISBET, J. delivering the opinion.

[1.] The defendant derives title to the land through a judgment, *de bonis testatoris*, against the executors of the plaintiff's father. The plaintiff insists, that a sale of land, under such a judgment, does not divest the heirs; because, he says, the title is primarily in the heirs; that it does not pass to the executor; and although lands are liable to pay debts, yet only secondarily liable after the personal estate is exhausted, and only then liable, through an order to sell, by the Court of Ordinary. The heirs may, as we have held, maintain ejectment against a stranger. Their title, though, is in subordination to the right, and, indeed, obligation of the representative of the decedent, to appropriate the lands, if necessary, to the payment of debts. Lands are assets in Georgia, to pay debts, as well as personalty. Whether an executor or an administrator can convey a title, except through an order of the Ordinary to sell, would be a very different question—a question not made. There is no doubt but that the law, through a judgment, can sell lands of a decedent. A judgment *de bonis testatoris*, binds all the property of the estate, both real and personal. Here, as well as in England, the personal estate, if there be no express directions in the will about the payment of debts, is generally first liable. It is the duty of the representative so to apply it, and if he fail in this duty, and the real estate is unnecessarily sold, under judgment, to pay debts, he may be guilty of a *devastavit*. Here is a valid judgment against the whole estate, rendered by a Court of competent jurisdiction. If, by neglect, the

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executors have permitted the judgment to pass, and the heirs are wronged by an unnecessary sale of the land, let them look to them. The lien of this judgment attached upon the land, and a sale under it divested their title.

Let the judgment of the Court below be affirmed.

No. 40.—JOSEPH S. WORTHY *et al.* plaintiffs in error, vs. SANKY T. JOHNSON *et al.* defendants.

- [1.] To sustain a bill against the charge of multifariousness, it is not indispensable that *all* the parties should have an interest in all the matters contained in the suit. It is sufficient, if each party has an interest in some matter in the suit, which is common to all, and they are connected with others.
- [2.] Creditors and heirs, as a general rule, can only sue third persons through the representative of the estate. The exception is, where there is collusion, insolvency, unwillingness to collect the assets, when called on, or some other like special circumstance.
- [3.] If heirs elect to set aside purchases made by executors, administrators, or guardians, at their own sale, they must go into Equity; and such sales are voidable only, and not, *per se*, void.
- [4.] The doctrine of market overt in England, has not been generally recognized or enforced in this country.
- [5.] The doctrine of market overt, applies to *judicial sales*, as well as to public sales, made under authority of law, by executors, administrators and guardians; and *caveat emptor* is the rule of all such sales.
- [6.] Neither are Sheriffs, executors, or other officers of the law, and trustees, liable for the title or soundness of property sold by them, at public sale, unless upon their own express warranty, or where fraud exists.
- [7.] Neither Sheriffs, nor executors, or administrators, can bind the execution debtor, or the estate of their testator or intestate, by any covenant respecting the property sold, or any other contract originating with themselves, and unauthorized by law.
- [8.] All such covenants are personal merely, if it can be plainly inferred that they intended so to bind themselves.
- [9.] Is it necessary to its validity, that every order of the Court of Ordinary, authorizing a sale of real estate or slaves, should recite, upon its face, that

it was made fully and plainly to appear to the Court, that the same was for the benefit of the heirs and creditors of the estate? *Querr.*

- [10.] Executors and administrators, in making sales of property, must comply with the statutory provisions, which authorize them, in every essential direction; otherwise, the interest of heirs and creditors will not be divested.
- [11.] This rule has been somewhat relaxed in favor of *bona fide* purchasers, but operates with full force against executors and administrators who purchase at their own sales, as well as against those who subsequently derive title from them, under a *judicial sale*, as execution debtors.
- [12.] The Statute of Limitations is a good objection, as a defence by demurrer, if the facts appear upon the face of the bill; if not, it must be made available by plea. In Equity, if the complainant be within any exception of the Statute, it is incumbent on him to state it in his bill.

Bill for discovery and relief, in Troup Superior Court. Demurrer decision, by Judge HILL, at November Adjourned Term, 1849.

The heirs of Thomas Worthy filed this bill against certain purchasers of negroes, sold by his executors, at public sale, and against the present holders of certain other slaves that were bought by said executors, at their own sale, and which had been sold by the Sheriff, as the property of said executors.

The bill avers that Thomas Worthy died testate, leaving all the negroes here in dispute for equal distribution between his wife and children. He conferred no power on the executors to sell the same. The executors obtained an order of the Ordinary Court, to sell said slaves and the real estate, which order did not recite the existence of the specified pre-requisites of the Statute to the granting of said order, but simply recited that it was applied for, and the executors had published said application in terms of the law—did not recite that the other personal property and the hire of the negroes, were not sufficient to pay the debts, &c.; that under said order, the executors proceeded, and sold the said negroes, without having advertised said sale sixty days, in any public gazette, or at the court-house door; that at said sale, a part of the negroes were purchased by some of these defendants, and another portion were purchased by said executors, which latter portion had thereafter been sold to some others of these defendants.

The bill was demurred to—

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1st. For multifariousness; no privity in defendants; cause of action is separate and distinct against each one; and no combination shown.

2d. It is brought in the name of the wrong parties; should have been brought by Worthy's legal representative.

3d. That complainants have a Common Law remedy.

4th. There is no equity in the bill.

The Court sustained each of the grounds, and dismissed the bill; and to this decision complainants excepted.

JOHN L. STEPHENS, for plaintiff in error, cited—

Mitford's Plead. 241. 2 *Vern.* 37. 1 *Atkyns*, 283. 5 *Maddox Ch. R.* 93, '4. *McCartney et al. vs. Calhoun et al.* 11 *Ala. (N. S.) Rep.* 110. 8 *Ves.* 347. *Lester vs. Lester*, 6 *Ib.* 631. 10 *Ib.* 393. 17 *Ib.* 168. 5 *Ib.* 680. *Prince's Dig.* 234, 238.

B. H. HILL and O. A. BULL, for defendants in error, cited—

Story's Eq. Pl. 218, 394, 406, '7, 412. 2 *Ves. Jr.* 95, 486. 6 *Johns. Ch. R.* 115. *Fellows vs. Fellows*, 4 *Cowen*, 682. 1 *McCord*, 132. 3 *Ib.* 371. 3 *Peere Williams*, 394. 2 *McCord Ch. R.* 169. 4 *Paige*, 47. 6 *Ves.* 748. *Bond et al. vs. Zeigler et al.* 1 *Kelly*, 342.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The first ground taken in the demurrer is, that the bill is multifarious, because it joins defendants, some of whom purchased directly themselves, at the executor's sale, while others bought at second hand, under executions against the executors, who purchased at their own sale.

All the defendants, as purchasers of the slaves, as the property of Worthy, have a common interest in resisting the equity of complainant's demand. They have, also, a common interest in sustaining the validity of the executor's sale, under which they all derive title; and these points being common to all, the bill is not multifarious. It is not indispensable that all the parties should have an interest in *all* the matters contained in the suit; it will be sufficient if each party has an interest in *some* matter in the

suit, and they are connected with others. *Addison vs. Walker*, 4 *Young & Coll.* 444. *Parr vs. Attorney General*, 8 *Clarke & Fin.* 435.*

[2.] The second ground of demurrer is, that the bill should have been brought by the administrator, *de bonis non*, and not by the heirs.

The general rule undoubtedly is, that creditors and heirs can sue only through the legal representative—the exception is, “unless there be collusion, insolvency, *unwillingness to collect the assets*, or some other special facts to warrant it. *Gilbert vs. Thomas et al.* 3 *Kelly*, 575, and authorities there cited. The bill in this case expressly charges, that application to sue has been made to the administrator, and that he refused to institute proceedings for the recovery of this property. He is properly, therefore, made a co-defendant.

It is suggested that the name of the representative might be used, without his consent, to maintain this suit. *A ne exeat*, however, or some other proceeding, requiring his voluntary action, might become necessary, in the course of the litigation, to protect the interest of the heirs.

[3.] The third ground taken in the demurrer is, that the complainants have an ample Common Law remedy. None has been pointed out—none occurs to this Court; on the contrary, they are compelled to resort to Equity to make their election—not to ratify the purchase made by the executors at their own sale. This step is equally necessary to render a satisfactory reason for not suing through the legal representative of the estate.

[4.] The next and last ground in the demurrer is, that there is no equity in the bill; and the main points insisted on here, are, first, that the sale is valid, and secondly, if it is not, that the defendants, being *bona fide* purchasers, cannot be affected by any irregularity in the sale, or in the proceedings of the Court of Ordinary, under which it was made.

Does the doctrine of *caveat emptor* apply to the public sales of executors, administrators and guardians, made under the authority of law? While the rules relating to market *overt* in England, by which certain privileges are allowed, which are not granted to private sales, have not generally been recognized or enforced in

*See *Ward vs. Brantley & Daniel*, 5 *Ga. Rep.* 571.—[Rep.]

this country, and the doctrine obtains here, that no person can make a valid sale of property to which he has no title, and which he is not authorized by the real owner to sell:

{5.] *Judicial sales* are an exception; and in respect to these, as well as sales made under the Probate Acts of the several States, and sales of goods found, and of estrays, the general rules of market *overt* apply. *The Monte Alegre*, 9 *Wheat. Reps.* 616. *Heacock vs. Walker*, 1 *Tyler's R.* 341. *Forsythe vs. Ellis*, 4 *J. J. Marsh.* 298. *Sims vs. Alexander*, 3 *Yeates' R.* 268.

In South Carolina, it has been expressly held, that *caveat emptor* is the best possible rule that can be laid down. The Court emphatically states, that all who attend such sales, ought to take care and examine into the title, &c.; that no warranty, express or implied, can be raised on the part of the owner, as to whom the proceeding is compulsory; nor of the Sheriff, who is the mere agent of the Court; nor of the Court itself—and that the purchaser was compelled to pay the money bid at such sale, notwithstanding any defect in the title. *The Creditors of Thayer vs. Sheriff of Charleston*, 2 *Bay.* 170.

[6.] In the case cited from *Wheaton*, the question of liability in judicial sales, particularly as to the quality of goods, was very fully considered, and it was there held—

1. That the owner is not chargeable for any representation or warranty of the agent of the law in selling.

2. That the officer is only the minister of the law, to execute the orders of the Court, and cannot be considered as warranting the property sold, so as to render himself personally liable, while he acts within the scope of his authority; and that the rule *caveat emptor* applies, generally, from the nature of the transaction, to all judicial sales.

Where a Sheriff sells goods on execution, there is, probably, an implied warranty, that he does not know that they are *not* the property of the execution debtor; and for a breach thereof, *assumpsit* would lie, perhaps, at the instance of the purchaser against the officer, to recover to the extent to which he has been damaged by the deception. *Pets vs. Blades*, 5 *Taunt.* 657.

[7.] The same doctrine applies to sales made by executors and administrators, under authority of law. A license to sell, gives no power, by warranty, to bind the estate which they represent. It would be but reasonable, that the Legislature should confer

this power, under certain restrictions. It would enable trustees to sell for a better price. And why should not the estate, at any rate, to the extent of the residue in the hands of the representative, be responsible to the holder for any failure?

Still, I repeat, the principle unquestionably is, that the representative has no power of charging the effects of the estate, by any contract originating with himself; neither is he required, by any duty of his office or trust, to enter into personal obligations respecting property which he sells. He is at liberty, to be sure, to do so, if he chooses, and by thus exciting the confidence of purchasers, enlarge the proceeds of the sale.

[8.] The exemption of executors, administrators and other trustees, from personal responsibility to a purchaser, except where fraud exists, or there is an express warranty, seems to be indispensable. For who would accept an office of this kind, if he were to become necessarily the guarantee, of him whom he represents, of the good title and soundness of all the property submitted to his charge, and which he may be obliged, by order of Court, to sell. It would be but poor indemnity to have to look, if a recovery were had against him, to creditors, distributees and legatees. It would but ill comport with the policy of the law, that officers so necessary should be subject to the operation of a principle, so fraught with danger to their interest, as to deter every one from the acceptance. 2 Har. & Gill. 176. It might be otherwise, if the purchase money remained in their hands, unadministered.

Can an executor or administrator become a purchaser at his own sale? In some of the States it has been decided, that such sales are, *per se*, void; and the Legislature of this State, by a recent Statute in relation to Sheriffs, have gone far to sanction this principle. They have not only prohibited Sheriffs from buying at their own sales, but declared all such purchases absolutely null, and have, in addition, subjected the officer to a public prosecution and severe punishment, upon conviction for a violation of the law. And much, perhaps, might be said in support of this principle, upon the score of public policy.

The doctrine, however, maintained, as it respects this class of trustees, by this Court, is, that where a purchase is made by a trustee, on his own account, of the estate of the *cestui que trust*, although sold at public auction, it is in the option of the *cestui que*

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trust to set aside the sale, whether *bona fide* made or not; and that it is voidable only and not absolutely void. *Campbell vs. Walker*, 5 Ves. 678, 680. 13 Ves. 601. *Ex parte Lacey*, 6 Ves. 625. *Ex parte Bennett*, 10 Ves. 381, 385, 386. *Morse vs. Royal*, 12 Ves. 355. *Whitcomb vs. Minchon*, 5 Mad. Rep. 91. *Bell's Supplement*, pp. 11, 12. The heirs should make their election within a reasonable time, otherwise they would be precluded.

It is contended that the defendants, or at least that portion of them who bid off property, directly, at the sale, themselves, are protected in their title, because, as it is alleged, they are *bona fide* purchasers, even admitting the sale to have been contrary to law.

[9.] Two objections are taken to the legality of the sale. One, that the order of the Court of Ordinary does not show, upon its face, that the Court had jurisdiction; and the other, that the property was not advertised for sixty days, as required by the Statute. The Act of 1829, provides that "It shall be lawful for the Inferior Courts of the several Counties in this State, when sitting for ordinary purposes, to order the sale of any slave or slaves, belonging to the estate of any testator, or intestate, or ward, on the application of the executor or executors, administrator, administrators or administratrix, or guardian or guardians, which shall be at public auction, and on the first Tuesday in the month, between the usual hours of sale, at the place of public sales in the County where the letters testamentary of administration or guardianship may have been granted, giving sixty days' notice thereof in one of the gazettes of the State, and at the door of the court house of the County where such sales are to be held, when it is made fully and plainly to appear, that the same will be for the benefit of the heirs and creditors of such estate, or of the ward of such guardian or guardians: *Provided*, that a notice of such application for leave to sell, be first made known, in one of the public gazettes of this State, at least four months before any order absolute shall be made thereupon." *Prince*, 284.

The order passed by the Court of Ordinary, authorizing the sale, is in these words: "Upon the application of Benjamin P. Robinson and Jane Worthy, executor and executrix of Thomas Worthy, deceased, for leave to sell the real estate and all the negroes of said Thomas Worthy, late of this County, deceased, and having published the same in terms of the law, it is ordered by

the Court, that they proceed to sell the same in terms of the law in such case made and provided."

The bill charges, that the sale was not advertised for sixty days, nor at the court house door, as required by law and the order of the Court.

In *Clements vs. Henderson*, (4 Ga. Rep. 148,) this Court held, that "In order to divest the title of the heirs to the lands of their deceased intestate ancestor, by an administrator's sale, it must be shown that the requisitions of the Statute, authorizing such sale, had been complied with;" and farther, that "after the authority of the Court of Ordinary to make the sale has been shown, the recitals in the deed made by the administrator to the purchaser, of the acts required to be done by him, under the Statute, will be considered as *prima facie* evidence of the truth of such acts having been done, until the contrary is shown."

It is not necessary, at this time, to express any opinion as to the validity of the order under which this sale was made. One of my brethren is very clear, that this order is insufficient; that our Courts of Ordinary, like all other Probate Courts, both in England and in this country, are Courts of limited jurisdiction, and that if no warrant is found upon the face of the proceedings of the Court, that then their acts must be taken to be *coram non judice*; that the fact does not appear in this order that it was made fully and plainly to appear, that the contemplated sale was for the benefit of the estate, and that, consequently, the Court of Ordinary had no more cognizance of the question of sale, than a Justice of the Peace had.

On the other hand, and without intending to confound the distinction between Courts of general and special jurisdiction, some of us think, that Courts should give a liberal construction to Statutes authorizing the sale of real estate and slaves, in Georgia, by executors and administrators; that public policy requires that all reasonable presumptions should be made in support of such sales, in favor of *bona fide* purchasers, especially respecting matters *in pais*. The number of titles thus derived, and the too frequent inaccuracy of Clerks and others concerned, in effecting these sales, renders this absolutely necessary; that if a different rule prevailed, purchasers would be timid, and estates consequently sold at a diminished value, to the prejudice of heirs and creditors; moreover, that mere *paper work* of this sort will afford

no guaranty for the security of estates, it being a notorious fact, that the fraudulent and selfish are the very *Pharisees of the law*, as to all formal observances, and that widows and orphans, as well as creditors, must look alone for protection to the vigilance of our Courts of Ordinary.

I allude to this point at this time, simply for the purpose of calling attention to it, and of suggesting to all concerned, the importance of reciting, in all orders for the sale of property, the facts which, under the law, authorize the Court to interfere; and, farther, that as a part of the proceeding, it may be of vital consequence to send up a copy of the petition of the party, upon which the action of the Court is predicated, as this may be sufficient, under any view of the law, to confer jurisdiction.

[10.] It is conceded, on all hands, that executors and administrators, in making sales of property, must comply with the statutory provisions authorizing them, in every essential direction; otherwise, the interest of heirs and creditors will not be precluded. *Monroe vs. James*, 4 Mun. 200. *Knox et al. vs. Jenks*, 7 Mass. R. 492. *Wiley & Gayle vs. White & Lester*, 3 S. & P. 358.

[11.] And while this rule may be somewhat relaxed in favor of innocent purchasers, (6 Porter, 219, 262. 1 Ala. R. N. S. 708. 9 Ib. 285,) yet it will certainly operate with full force against executors and administrators, who purchase, at their own sales, as well as against those who have subsequently derived title, through a *judicial sale*, from them, as execution debtors.

[12.] The Statute of Limitations has been relied on in the discussion, and this objection may be taken, no doubt, as a defence by demurrer, if it appear on the face of the bill. At Common Law, the plaintiff replies to the plea of the Statute, if he would take himself out of it; but in Equity, if he be within any exception of the Statute, it is incumbent on him to state it in his bill; but here, the pleader has intentionally or otherwise, omitted to state the time when the negroes in controversy were sold by the executors, when the Statute would begin to run in favor of the defendants, unless prevented by some special reason. Under these circumstances, it can only be taken advantage of, by plea.

Some of the matters of which I have treated, might have been avoided. Having, however, determined to overrule the demurrer, and to send this bill back, to be pleaded to or answered, I

thought it best to advert to them now, as they would be necessarily involved in a trial upon the merits.

Judgment reversed.

No. 41.—BENJAMIN H. CAMERON *et. al.* plaintiffs in error, *vs.* STEPHEN WARD, defendant.

[1.] Where C and J obtained the legal title to land, as security for a small sum advanced to W, under peculiar circumstances—the sum advanced not being one-fourth the alleged value of the land—promising to re-convey the same to W, on the re-payment of the sum advanced with interest, but who fraudulently conveyed the land to a *bona fide* purchaser: *Held*, on a demurrer to the bill, insisting on the Statute of Frauds, as a bar, that the demurrer should be overruled—that the Statute was intended to prevent fraud, not to protect it; and that in such cases, a Court of Equity would take hold of the conscience of the defendants, and hold them as trustees, for the benefit of the party defrauded.

Bill, &c. in Troup. Decision by Judge HILL, at November Adjourned Term, 1849.

This bill alleges, that in 1835, Stephen Ward purchased of one Thomas Walker, lot No. 2, in 11th District of Troup, for \$750; that Walker had bought of one Christina Thomas, the drawer, in 1832; Ward went into immediate possession, and so continued until the latter part of 1847; that in 1835, he wrote to the Surveyor General to know if the grant had issued, and was informed that it did issue before the purchase by Walker; that in 1847, he learned that said lot had been granted, under the then late law, to Thomas Whitaker, and sold by him to Pleasant Compton; that in November, 1847, he went to Milledgeville, and that Compton, under the peculiar circumstances, agreed to sell him the lot for \$200; that the defendants below, Cameron and Johnson, being there, as members of the Legislature, and his immediate representatives, in whom he had great confidence, advised him to pay

the \$200, and thus keep his homestead;—that upon his replying, that he had not the money with him, they agreed to advance him the \$200, and for their security, were to take the title in their own names, which they agreed to make to him on their return home, upon his refunding the money with interest; that having a little more money with him than sufficient to pay his expenses home, he handed them \$20 towards the land; that about 25th December thereafter, about the time he expected them home, he procured the money, and sent it by a friend to Cameron's house, and learned that he had not then returned; that shortly after, he was taken sick, and about 1st February, 1848, he procured the money to be again carried to Cameron, who informed the messenger that Johnson had sold the land to one Wm. A. Spear; that the money was then tendered to Johnson, and a deed demanded, who declined making it, for the reasons named. The value of the land is alleged to be one thousand dollars. The bill prays that defendants below be decreed to pay the value of the land, \$1000. This bill was demurred to—

1st. Because it showed on its face, that complainant had as ample and adequate relief at Common Law, as in Equity.

2d. That there was no equity in the bill, and insisting on the Statute of Frauds.

The Court overruled the demurrer, and ordered defendants to answer, &c. To which ruling, defendants excepted, and thus the case comes up.

B. H. HILL and STOKES, for plaintiff in error.

COLE, for defendant in error.

By the Court.—WARNER, J. delivering the opinion.

[1.] The complainant alleges that he purchased the lot of land in controversy, in 1835, from Walker, for which he paid \$750 00, went into the possession of it, and made valuable improvements, not doubting the grant from the State had issued; that in 1847, to his surprise, he learned that the lot was not granted at the time of his purchase from Walker, but had been granted to one Whitaker, under the late Act of the Legislature, who had sold it to Compton; that he visited Milledgeville during the session of the

Legislature of 1847, to see Compton in relation to the land, who, under the peculiar circumstances of the case, agreed to sell the land to him for \$200, which the complainant alleges was worth \$1000. The defendants being the friends, both personal and political, of the complainant, and his immediate representatives in the Legislature, and having entire confidence in them, he sought their counsel and advice in the matter. They advised him to purchase the land at the price which Compton offered to take for it. On the complainant telling them he did not have the money with him, the defendants offered to advance it for him, and for their security, agreed to take the title in their own names, and on their return home, re-convey the same to the complainant, upon his refunding them the \$200, with interest thereon; whereupon, Compton executed the title to them, they having advanced to the complainant the \$200 in payment therefor. Before leaving Milledgeville, the complainant, finding he would have more money than sufficient to pay his expenses, paid over to them \$20, in part payment of the \$200 advanced to him. The complainant sent the money to one of the defendants, before the 25th December, but Cameron had not then returned home. Complainant was taken sick, and was not able to go and refund the money in person immediately after their return home, but about the first of February, 1848, he sent the money to Cameron, one of the defendants, by the hand of A. Wilkinson, who was told by Cameron, that Johnson, the other defendant, had sold the land to Spear, and made a deed to it, and refused to receive the money.

So, it will be perceived, from the allegations in the complainant's bill, which, for the purpose of this decision, must be taken to be true, that the defendants, taking advantage of the confidence of the complainant, and obtaining the deed only as security for the money advanced by them, to enable the complainant to purchase the land from Compton, for the small sum of \$200, when it was worth \$1000, they now seek to appropriate the benefit of complainant's low purchase to themselves, and to realize the full value of the land, and when he calls upon them to account with him, they confess the allegations made in the bill by their demurrer, and insist on the Statute of Frauds, as a bar to his right to call them to account for this act of bad faith on their part.

The Statute of Frauds was enacted to prevent fraud, not to protect such a transaction as this is alleged to be. Mr. Justice Story,

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speaking of the Statute of Frauds, says: "In the construction of that Statute, a general principle has been adopted, that, as it is designed as a protection *against fraud*, it shall never be allowed to be set up as a protection and *support of fraud*." 1 *Story's Equity*, 323, 1330. *Roberts on Frauds*, 79, 103. *Strickland vs. Aldridge*, 9 *Vesey*, 516. *Mestier vs. Gillespie*, 11 *Vesey*, 627, '8. *Brown vs. Lynch*, 1 *Paige's Ch. Rep.* 147. This is a proper case for Equity jurisdiction. In cases of *fraud*, a Court of Equity will take hold of the conscience of the defendant, and hold him as a *trustee*, for the benefit of the party defrauded, and not allow him to shelter himself under the Statute of Frauds, as he might do in a Court of Law.

The defendants, in justice to themselves, ought to answer the allegations in this bill, and the Court below, very properly, overruled their demurrer.

Let the judgment of the Court below be affirmed.

No. 42.—EDWARD BROUGHTON, administrator, &c. plaintiff in error, vs. CHARLES WEST, defendant.

- [1.] The cutting off the name of a surety to a joint and several note, with the consent of the payee, is not such a material alteration as will invalidate it.
- [2.] A limitation of a promissory note, in remainder, by deed or will: *Held*, to be good.

Assumpsit, from Troup County. Decision by Judge HILL, at November Adjourned Term, 1849.

Charles West brought his action against Broughton, administrator of L. Lackey, on this note: "One day after date, I promise to pay Charles West, or bearer, five hundred dollars, for value received, with interest from 25th December last. January 22, 1842." Defendant's counsel objected, on the trial, to said note as

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evidence, because it had been altered without the knowledge of Lackey, the maker, in this, that the name of one Thos. McKee, who had signed as surety, had been erased at his request—erased by West, the holder. An ante-nuptial settlement deed was then read, which settled upon trustees, for the sole and separate use of West's intended wife, during her life, with remainders over, certain specified property, among which were certain promissory notes, (for which the note sued on was substituted) and certain perishable and household furniture.

The Court charged the Jury, that the alteration of the note was an immaterial one, and did not affect its validity; and that an estate in remainder, could not be created in promissory notes, and that by said deed, the trustees took no interest in the notes, and that the title remained in West and his wife.

To which charge and direction of the Court, defendant also excepted, and on all these grounds, filed his bill of exceptions, and brings up this case.

B. H. HILL and STOKES, for plaintiff in error, cited—

Chitty on Bills, 181, '2. *Breese's Rep.* 301. 1 *Denio*, 120. 1 *Deveraux*, 115. *Hill on Trustees*, 44. 10 *John. R.* 12. 2 *Kent*, 352.

INGRAM, for defendant.

By the Court.—NISSET, J. delivering the opinion.

[1.] The release of the surety, and cutting his name off this note, does not invalidate it. A great deal of the doctrine of the English books, relative to the alteration of bills and notes, arises out of the policy of the Stamp Acts of Great Britain. Those Acts are not of force in this State. The policy of the English Stamp Acts, is revenue. The more contracts of this sort, the more duty; hence the rigidity of the rules as to alterations. Alterations require new contracts, and new contracts bring larger revenues. But aside from these Acts, the rules upon this subject are very strict. Upon principle, they ought to be so. Parties ought to be held to abide their contracts, as they make them. The written contract is the evidence of what are the rights, and what the obligations of all who are parties to it. If one or more of the parties,

or a stranger, could alter or vary it in one particular, without the consent of other parties, why not in all particulars? And if it were in the power of one or more to alter bills or notes, without the consent of others, then the bills and notes would be no evidence of contracts. Commercial policy requires that negotiable securities should remain just what they are when issued. The principle involved is, that the contract remain the same, in order that the rights of the parties remain the same. The law is careful to permit no temptation to fraud. It, therefore, will not permit a party to make alterations in a bill or note, without subjecting him to loss. Immunity would be a temptation to fraud. Any alteration, therefore, which will affect the contract, so as to affect rights under it, will make it void. According to this rule, I do not see how the cutting off the name and release of the surety, with the consent of the payee, before the note passes out of his hands—whilst he is sole owner—can invalidate the note. The payee can, if he will, release the liability of any party. He does it, of course, at his peril. He having done so, he has no right to complain; and if such release does not affect the rights of other parties, they cannot complain. In this case, the parties to the note are the maker, and his sureties, being joint and several promisors, and the payee. There is no contract between the principal and surety, which is affected by a release of the surety. The principal is bound at all events, whether the name of the surety is taken off or not. The note, with the surety's name on it, is joint and several, upon which, both are together liable to suit, or each, singly. With the surety's name taken off, the principal stands liable, as before. He had no rights, as against his surety, whilst his name was on the paper, any more than he now has, and his contract with the payee remains precisely the same. Upon principle, there seems to be no reason for holding that this alteration affects this note; nor does it, upon authority. The rule is, "that if a bill or note be altered, without the consent of the parties, in any material part, it will be void as to all parties not consenting to the alteration, even in the hands of an innocent holder—as, in the date, sum, time when payable, or consideration. Nor does it matter by whom made; the alteration is fatal, whether made by a party or a stranger—whether innocently or fraudulently." Any thing will be material, I take it, which varies the rights and obligations of the parties in the minutest particular. In what particular the

obliterating the name of the surety affects the principal, I cannot see. He, in this case, is the only party to be affected. It is not an alteration of the note in a *material part*. *Chitty on Bills*, 181, 182, 183, and notes. *Bayley on Bills*, 90 to 96, and notes.

[2.] The presiding Judge held, that an estate in remainder could not be created in promissory notes, and upon that holding, error is assigned. This Court has held differently. A treatise might be written upon this question, with propriety. The origin, progress and present condition of it, are fruitful themes for the display of judicial learning. Of this, I am neither ambitious nor capable.

Without putting a construction upon this marriage settlement, (for that is not made necessary by this record) I shall content myself with transcribing what this Court has said, through my brother LUMPKIN, in *Kirkpatrick vs. Davidson*, (2 *Kelly*, 301.) "Anciently, there could be no limitation ever of a chattel, but a gift for life carried the absolute interest. Then a distinction was taken between *the use* and the *property*, and it was held, that the use might be given to one for life, and the property afterwards to another, though the devise over of the chattel itself would be void. It was finally, however, settled, that there was nothing in that distinction, and that a gift for life of a chattel, was a gift of the use only, and the remainder over was good as an executory devise. And the general rule, as now established by numerous decisions, is, that if a man, either by *deed* or *will*, limit his chattels to A for life, with remainder over to B, the remainder is good." If it were conceded that such remainder is bad, directly by deed, yet, there would then be no doubt of its being good, when settled by deed of trust. *Gilb. on Uses and Trusts*, by Sugden, 121, note 4. *Hargroves*, note 5 to *Coke Litt.* 20, a. And this doctrine extends to choses in action, as well as other chattels. 1 *Cruise's Dig. tit.* 12, ch. 1. *Hobson vs. Trevor*, 2 *P. Williams*, 191. *Wright vs. Wright*, 1 *Vesey, Sr.* 411. *Hill on Trustees*, 44. *Foley vs. Burnell*; 1 *Bro. C. C.* 274. *Hastings vs. Douglass*, *Cro. Car.* 343. 10 *Johns. R.* 12. 2 *Serg. & Rawle*, 59. 1 *Burrow*, 284. 1 *Bailey's S. C. R.* 100. 2 *Kent*, 352. 2 *Black.* 398. 13 *Conn.* 42. *Cro. J.* 59. 1 *Dana's K. R.* 237. 2 *Vern. R.* 59. 5 *Johns. C. R.* 334. 2 *Day. R.* 28. *Ib.* 52. 2 *Munf.* 479. 4 *McCord*, 427. 2 *Hill, S. C.* 443.

Let the judgment be reversed, on the last assignment.

No. 43.—ANDREW TURNER, plaintiff in error, vs. WILLIAM COLLINS, administrator, &c. defendant.

[1.] A writ of error will be dismissed, if a copy is not served, and an entry made thereof, within the time required by the 21st Rule of this Court.

[2.] And the party failing to endorse the entry of service, as required by the 21st Rule, before the writ of error is transmitted to this Court, by the Clerk below, will not be permitted to come here, and, on motion, have the omission supplied.

[3.] The amended Constitution, and Act of 1845, organizing this Court, exact the utmost vigilance of parties, and allow no discretion in relieving them from their failure to exercise it.

Preliminary motion to dismiss the cause—

1st. Because the testimony was not embodied in the bill of exceptions.

2d. Because it does not appear, from the certificate of the Clerk of the Court below, that all the interrogatories to which he has certified, were read on the trial.

3d. Because the bill of exceptions does not embrace the material facts upon which the judgment of the Court was rendered; therefore, not enough before this Court to enable it to review the judgment.

4th. Because the Judge did not certify that the bill of exceptions is true and consistent with what transpired in the cause before him.

5th. Because no copy of the writ of error was served upon the defendant in error, or his counsel, as required by the 21st Rule of this Court.

DOVAL & NOLAN, for motion.

A. R. MOORE, contra.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] By the 21st Rule of this Court, it is required that writs of error, with the citations thereto annexed, shall be filed with the Clerk of the Superior Court, when the original notice of the

signing of the bill of exceptions is returned to that office, copies of which, made out by the counsel of the plaintiff in error, shall be served on the defendant in error, by the Sheriff of the County, or by counsel for plaintiff in error, within ten days from the signing and certifying of the bill of exceptions; and an entry of the same shall be made on the original writ, by the counsel or Sheriff who makes it, officially; and it is then made the duty of the Clerk of the Court, where the trial is had, to send up to this Court, together with the bill of exceptions and transcript of the record, the writ of error and citation, duly by him certified to be the originals filed in his office. *Supreme Court Manual*, 31, 32.

[2.] The writ of error in this case has no entry of service made thereon, either by the Sheriff of Henry County, where the proceeding below took place, or by the counsel of the plaintiff in error; and Mr. Moore, as the attorney of Andrew Turner, proposes now, to supply the omission, and make the entry in this Court, *sua pro tunc*. It is resisted by the opposite party, and a counter affidavit submitted, to the effect that the defendant never was, in fact, served with a copy.

We cannot allow this entry of service to be now made. To permit it, would not only repeal the Rule, but be productive of much mischief. The entry of service, if made as directed, is conclusive—it cannot be controverted here, as the return of ministerial officers can be in the other Courts of this State; and this is giving advantage enough to plaintiffs in error. The only evidence which we receive in this Court, is that which is transmitted through the Clerk of the Superior Court, and it all must be in writing, and, if defective, it cannot be rectified by amendment or otherwise. The entry of service is presumed to be correct, from having been made at the time the act was done. It would greatly weaken its authority, to suffer it to be made at a future day, inasmuch as the party must then depend upon the strength and tenacity of his memory for its correctness.

We think it impolitic to tempt counsel thus to shield themselves from the consequences of their own neglect, when, by the pleadings here, it is brought to their notice—when, in order to obtain a continuance, the party makes affidavit of the facts which he expects to prove by the absent witness—the opposite party is not allowed, by the 36th Rule of the Superior Courts, to force a trial, by an admission of the facts stated in the affidavit. 2 *Kelly*,

473. Why is this prohibited? The reason is to be found in public policy—it is to take away from the applicant, the motive to make his showing broader than the truth would warrant, and thus either force a continuance, or procure the admission of more than he could actually prove; in other words, both of these rules are based upon the same considerations which led to the enactment of 29 *Charles II.*

If this defect could be now cured, the other party might well complain, that he was taken by surprise. He examines the papers, as they appear of file in the Clerk's office of the Superior Court, previous to their transmission—he finds that the writ of error is not served; at any rate, that no entry is made thereof, as required, and he comes here to have the case dismissed, on that account; but his objection is overruled, and he is forced, without preparation, to argue the cause upon its merits; for, under the Constitution, this surprise is no sufficient ground for a continuance.

[3.] To allow this practice, would operate unequally upon the rights of parties. Here, the service is alleged to have been made by the counsel; but it is more usually done by the Sheriff, residing often in a distant and remote County, and who could not reach the Court in time to amend his return.

It would give rise to exciting and discourteous altercations, on account of the conflict of statement between counsel. Here, each party has tendered his affidavit—the one testifying to *personal service*—the other, just as distinctly denying it. We cannot and will not try this issue of veracity, or memory. We must and do believe, that both are equally credible, and entirely conscientious; and we assume, for the purposes of this decision, that a copy of the writ of error was served, but counsel failing to make entry thereof, as directed by the rule, we refuse the motion to come into this Court and do it now. Better that an individual should suffer, than allow a salutary rule to be broken down, merely for the purpose of relieving a party from the consequences of his own neglect.

In *Perry & Peck vs. Higgs*, (6 *Ga. Rep.* 43,) this Court held, that if the bill of exceptions bore date *before* the trial of the cause, and there is nothing in the record by which it can be amended, the writ of error will be dismissed. So, if the party fails to give notice, as required by the 4th section of the Act organizing this

Court, and to file the same, *with the return of service thereon, within the time required*, (2 Kelly, 262. 5 Ga. Rep. 582)—so, if notice of the signing of the bill of exceptions, and copies of the writ of error and citation, are not served within the time required by law and the 21st Rule of this Court, (4 Ga. Rep. 525)—so, if the Clerk fails to make out and transmit a copy of the record, within ten days from the filing of the original notice, *with entry of service thereon*; and the Clerk's certificate must show this fact, and the omission cannot be supplied by *aliunde* testimony. *Leak vs. McDowell*, 6 Ga. Rep. 264. *Duke, administrator, vs. Trippe*, 1 Ib. 317. And the uniform determination of this Court has been, not to look out of the *papers* to inquire into *any* fact; but whatever fact there appears, will be taken to be true; and if it does not appear *in writing*, it does not exist. 2 Kelly, 338. *Ib.* 439.

By reference to the adjudications of the Courts of our sister States, upon the subject of the issuing of the writ of error, service thereof, return, &c. they are equally rigid in exacting a stern compliance with the rules and regulations by which they are governed. It is true, that in some of them, they will not suffer a party to be turned out of Court, provided they are satisfied that he has done *all* that duty required. But after a most careful examination, I am prepared to affirm, that there is no State in the Union, where the same degree of vigilance is imposed on litigants, and where less discretion is allowed to the Court, to excuse them from failing to exercise it. *United States vs. Hodge*, 3 How. U. S. R. 534. *Rutherford vs. State Bank*, 3 Pike, 493, 558. *Coleman vs. Tidwell*, 5 How. Miss. R. 12. *Natchez Insurance Company vs. Stanton*, 4 Ib. 7. *Newell vs. Briggs*, 3 Ib. 45. *Roebuck vs. Duprey*, 2 Ala. 352.

I would only remark, in conclusion, that families, schools, corporations, courts, countries, the world, the universe, are all governed by *rules*, and *either* wanting these, ends in confusion and chaos.

Let the writ of error be dismissed, for want of entry of service made at the proper time.

Hogg *et al.* vs. Mobley and another.

No. 44.—JAMES V. HOGG *et. al.* plaintiffs in error, vs. ELDRIDGE MOBLEY and another, defendants.

[1.] Where an appeal is taken from the Court of Ordinary to the Superior Court, under the Act of 1805, which requires the appellants to give security to the Clerk for all costs which may accrue, by reason of such appeal: *Held*, that an acknowledgment, taken by the Clerk, that the appellants, and their security, were jointly and severally bound to the appellees for the payment of all costs that should accrue upon the appeal, in terms of the Statute, was a good and valid appeal, according to the true intent and meaning of the Act of 1805; and that the appellants, and their security, would be bound in law for the payment of all costs which might accrue, by reason of said appeal.

Caveat of a probate, in Coweta County, Decision by Judge HILL, at September Term, 1849.

In this case, E. Mobley and W. Mobley were the propounders of the last will of Jethro Mobley, and James V. Hogg and others were caveators before the Court of Ordinary of Coweta County. The decision of the Ordinary was against the caveators, and they appealed to the Superior Court of said County. On the trial of this appeal, among other points taken, (not excepted to) the propounders objected that the appeal bond was payable to the propounders, instead of to the Clerk. On a motion to dismiss the appeal, the Court sustained this exception, and ruled the bond void.

Caveators then moved to amend the bond, by inserting the name of the Clerk in lieu of the propounders, or to be permitted to file a new bond, *nunc pro tunc*, which the Court overruled. To all of which said rulings and decisions, the caveators excepted, and thus the case comes up.

COLQUITT and COLE, for plaintiffs in error.

W. DOUGHERTY and STOKES, for defendants.

By the Court.—WARNER, J. delivering the opinion.

[1.] By the Act of 1805, appeals are allowed from the Courts of Ordinary to the Superior Court, on the dissatisfied party paying all costs which may have accrued, and giving security to the

Clerk of said Court of Ordinary for such further costs as may accrue, by reason of such appeal. This Act does not require any *bond* shall be given to the Clerk—it prescribes no *form* for entering the appeal, but only requires *security* to be given to the Clerk, for such further costs as may accrue by reason of the appeal. *Prince*, 238.

From the record in this case, it appears that the caveators were dissatisfied with the decision of the Court of Ordinary, and applied to the Clerk thereof to enter an appeal, and tendered William C. Freeman as their security. The Clerk accepted the security tendered to him, and required the caveators and their security, to acknowledge themselves bound to the propounders of the will, for the payment of all costs that should accrue on the appeal, in terms of the Statute. All the Act of 1805 requires of the Clerk is, to take the *security* offered by the appellant—it is silent as to any particular *form* in which such *security* shall be bound; but we think the form adopted by the Clerk in this case, is a very common and appropriate one, to bind the security. If the appellees prevail, they will be entitled to enter up judgment for their costs against the appellants and their security, according to the second section of the Act of 1826. *Prince*, 461. By the Act of 1823, appeals from the Court of Ordinary are to be tried in the same way, and under the same regulations, as other appeals. *Prince*, 455. The counsel for the defendant in error seems to suppose the Statute requires a *bond*, to be made payable to the Clerk, and cites the case of *Anthony vs. Brooks*, 5 *Georgia Rep.* 578.

The Act of 1805, as we have seen, requires *no bond*, but that *security* shall be given to the Clerk. In *Anthony vs. Brooks*, this Court held, that a claim bond should be made payable to the Sheriff, for the reason that the Act of 1821 declares that the claimant shall give *bond to the Sheriff*, conditioned to *pay the plaintiff* all damages, &c.; besides, the Sheriff is to take the *bond* in a sum equal to double the amount of the property levied on, at a reasonable valuation, to be judged of by the levying officer. *Prince*, 448. In our judgment, the appellants in this case gave *security* to the Clerk, within the true intent and meaning of the Act of 1805, and that they and their security are bound in law for all costs which may accrue, by reason of such appeal.

Let the judgment of the Court below be reversed.

No. 45.—WALTER T. COLQUITT, plaintiff in error, vs. NICHOLAS S. THOMAS *et al.* defendants.

- [1.] A sells lands to B, and gets judgment on the notes given for the purchase money, and levies on the lands in the possession of C, a purchaser from B; C puts in his claim: *Held*, that upon the trial of the claim, it is not competent for A to set up, by proof, his lien as vendor, but that he must go into Equity to establish his lien, and there get a decree that the land be sold to satisfy it.
- [2.] The Circuit Judge, in opening his charge to the Jury, said, "that he wished counsel to take notice of his charge, for he supposed the case would be taken up, and if he erred, he could be corrected; and if the Jury found contrary to evidence, they could be corrected:" *Held*, that the remark, relative to the Jury, was improper, as tending to relieve them from the exclusive responsibility of trying the facts of the cause.
- [3.] Fraud cannot be presumed at Law, but it may be proven, from circumstances.
- [4.] To hear reports about an incumbrance upon land, which the purchaser is about to buy, does not amount to notice, nor is report or rumor a badge of fraud.
- [5.] The presiding Judge is requested, by counsel, in the hearing of the Jury, to give in charge a legal proposition, to which request, he replies, "well, I charge it," without anything more. This, held to be error.
- [6.] Upon the trial of a claim, it is not competent for the claimant to prove the *bona fides* of his purchase, by proving the conversation that passed between himself and his vendor, in relation to what he gave for the land, at a time subsequent to the purchase.
- [7.] The pendency of suits against a debtor, at the time that a purchaser buys lands of him, is a badge of fraud and a fact which the Jury are at liberty to consider, in determining whether the purchaser bought with notice or not, under the Statute 13 *Elizabeth*.
- [8.] To subject land to a judgment, sold by the defendant, before the judgment, to A, and by A sold to B, it is necessary that the plaintiff prove that the defendant sold fraudulently, and that both A and B had notice of the fraud, under the Statute 13 *Elizabeth*.
- [9.] One who buys from a fraudulent grantee, without notice of the fraud, and one who buys from an innocent grantee, with notice of the fraud, will be protected under the *proviso* in the Statute 13 *Elizabeth*.
- [10.] If one buys lands of a debtor, and pays a part of the purchase money before getting a deed, and before paying the balance of the purchase money and before getting a deed, learns that the purchase money is unpaid by the debtor—that he is insolvent, and that suits are pending against him: these facts may be submitted to the Jury as evidence that he purchased with notice of the fraud, under Statute 13 *Elizabeth*.

[11.] The sayings of an agent, after his actings as agent, are not competent to prove his agency.

Claim, in Campbell County. Issue joined, October, 1847. Verdict, "not subject," and decisions complained of—by Judge HILL, at October Term, 1849.

This was a claim case. Walter T. Colquitt had sold certain lands to Nicholas S. Thomas, taking in part pay certain notes, which he sued to judgment, and levied the *fi. fa.* issued therefrom for \$5,999 99½ upon said lands, or a portion thereof—the defendant, Thomas, admitting in his plea that the notes were for the lands afterwards levied on. On the claim trial, plaintiff in *fi. fa.* showed the grant to one Hiram Howard, then a deed from Howard to said N. S. Thomas and John P. Timberlake, (showed no title passing through himself,) and read other *fi. fas.* and judgments, at suit of other plaintiffs vs. said Thomas.

It appeared that said Thomas had sold said lands to A. H. Harrison and C. Williams, who subsequently sold to Nathaniel Harrison, who was the claimant on said trial. After the above testimony by plaintiff in *fi. fa.* claimant offered the said deed from Thomas, dated 30th March, 1844, then the deed from A. H. Harrison and Williams to claimant, dated 27th May, 1845. Colquitt's declaration vs. Thomas was returnable to April Term, 1844, and service acknowledged by Thomas, 6th January, 1844, and judgment in October, 1845. Plaintiff introduced various other testimony, and so did the claimant, which so far as material, and as elucidating the issues, will appear in what follows:

When claimant offered the testimony of a witness, as to what "he understood from the claimant, Abel Harrison and Clayton Williams," plaintiff below objected. The Court overruled it, and let in the testimony.

After the testimony closed, the Court charged the Jury, among other things, that he "wished counsel to take notice of his charge, as he supposed the case would be taken up, and if he erred, he could be corrected, and if the Jury found contrary to evidence, they could be corrected"—that "the pendency of the suits did not operate as notice, either positive or constructive, for the notes did not express the consideration for which they were given, and though the plea set forth that fact, the plea was not verified, and

if taken as evidence at all, would have to be taken together, and it set forth a partial failure of consideration." Further charged, "if the purchaser bought, *bona fide*, and had paid the purchase money, or any considerable part thereof, before he received notice of the incumbrance, he could go on after notice and pay the residue, and his title would be protected in this case, but that, perhaps, it would not in Equity—the plaintiff not now relying on his lien for the purchase money." Further, "that to hear reports about an incumbrance, did not amount to sufficient notice in Law;" and, by request of claimant, "the burden of proof was on plaintiff to show fraud, and that fraud was never to be presumed, though it might be proven by circumstances." The plaintiff's counsel then, verbally, it seems, asked the Court to charge the Jury as to a certain legal position, to which request, the Judge replied, "well, I charge it." The plaintiff's counsel then, in writing, requested the Court to charge, that "if they believed the deed to Harrison & Williams to defendant in *fi. fa.* was fraudulent, as to creditors, and that the claimant knew of the indebtedness of defendant in *fi. fa.* for the purchase money, or his insolvency, and the pendency of the suits, before he paid the purchase money and received title, that such title did not defeat the incumbrance, and was fraudulent." This the Court refused, and repeated the above charge, as to where notice was received after the trade and before payment, &c. as being the law in *this* case. Claimant then asked him to charge "that the sayings of C. Williams were not evidence to establish his agency." This the Court charged, adding that "testimony could be legally received for one purpose, and when so admitted, could not be made evidence for a different purpose; and that in this case, Williams' sayings, made after his agency, were not evidence to prove his agency." To the manner of said last charge, and to the refusal to charge, as herein set forth, the plaintiff in *fi. fa.* excepted.

The Jury found the property "not subject."

Plaintiff in *fi. fa.* then excepted—

1st. To the testimony of the witness, as to what he "understood from claimant and A. Harrison & Williams," and "in admitting parol evidence, (a part of said sayings,) to prove a contract for land."

2d. That the Court erred in saying to claimant's counsel, in the hearing of the Jury, that he "was by no means certain that

he was correct in rejecting the testimony of L. B. Watts, and as it did not amount to much, they had, perhaps, better suffer it to go before the Jury."

3d. As to that part of the charge *already recited*, as to the case being carried up, if he or the Jury erred, &c.

4th. That he erred in saying what he did—*already recited*—as to pendency of suits being notice, &c.

5th. That he erred in charging what he did—*already recited*—as to the right of the purchaser to go on and pay and take title after notice, &c.

6th. Also erred in *refusing* to charge what—is *already recited*—he was asked to do, as to claimant having notice of any fraud in the sale from Thomas to claimant's grantors, &c.

7th. That he erred in his charge, as to "reports as to an incumbrance,"—as *recited*—unless he had explained what he meant by reports, and that this charge was not applicable to the case.

8th. That he erred in saying—as *recited*—the burden of proof of fraud was on plaintiff, and was never to be presumed, &c.

9th. That he erred in not pronouncing (repeating?) the specific thing which he was requested by plaintiff to charge, instead of saying "well, I charge it."

10th. That he erred in saying that the sayings of Clayton Williams were not admissible in this case, to prove his agency.

S. T. BAILEY and C. B. COLE, for plaintiff in error, cited the following authorities:

Roberts on Fraud, 2, 3, 5, 122, 231, 422, 530, 1, and note, 595, 600, 1, 2, 7. *Lowry vs. Pinson*, 2 *Bailey's R.* 328. 18 *John. R.* 427. 1 *Conn. R.* 295. *Miffl. Pl.* 275. 2 *Danl. Pr.* 777. *Story's Eq. Pl.* §806. *Sugden on Vendors*, 760. 2 *Fonbl.* 414, n. 2 *Mad. Ch.* 322. 3 *P. Williams*, 307. 4 *Kent*, 180. 1 *Atk.* 384. 3 *Leigh*, 365. 1 *Story's Eq. Jur.* §395. 1 *Munf.* 38. 2 *Id.* 38, 129. 2 *Hen. & Munf.* 316. 2 *Atk.* 630. 2 *J. C. R.* 158. 5 *Id.* 229. *Harden's Rep.* 37. 1 *Hare*, 43. 6 *B. Monr.* 67. 7 *Id.* 312. 1 *Watts & Sergt.* 142. 3 *Day*, 503. *Co. Litt.* 344. *Powell on Mort.* 548, 547, note r. 3 *Atky.* 392. 13 *Ves.* 120. 1 *Oh. Cas.* 291. 1 *Cond. Ch. R.* 550. 5 *Price*, 306. 16 *Ves.* 419. 1 *John. O. R.* 301. 10 *John.* 462. 1 *Bur.* 149. *Cross on L.* 79. 2 *Atky.* 411. 1 *Vermont R.* 465. 3 *Har. & John.* 426. 4 *John.*

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234. 14 *Mass. R.* 245, 250. 3 *Kelly's Rep.* 513. 1 *Stewart's R.* 394. 1 *Bretard*, 166, 266. 4 *Mass.* 702, 8. 4 *John.* 234, note. *Riley's Cases*, 270, 2. 1 *Garrison*, 106.

EZZARD and LATHAM, for defendants in error, cited—

Greenl. Ev. 119, 20, 25. 1 *Story's Eq.* §372, 190. 1 *Fonbl.* 444, 347. 2 *Powell on Mort.* 564. 7 *Viner's Abr.* 123. 3 *John. CA. R.* 516. 12 *Wend.* 41. 4 *Bac. Abr.* 402. 3 *Sugd. on Vend.* 117, 315. 8 *Couen*, 260. 10 *John.* 457. 3 *Serg. & Rawle*, 429, 18 *John.* 555. 1 *Wash.* 4. 3 *Kelly*, 446. 4 *Georgia Rep.* 104. 1 *Kelly*, 157. 2 *Ib.* 1. 1 *Smith's Lead. Cas.* 29 to 60. 5 *Ga. Rep.* 293. 13 *Ves.* 121. 1 *Ves. Jr.* 226. 6 *Ga. Rep.* 344, 525.

By the Court.—NISBET, J. delivering the opinion.

The plaintiff in execution, Judge Colquitt, sold a body of land to the defendant in execution, Dr. Thomas—taking his notes for the purchase money. He sold to Harrison & Williams, and they to the claimant, Mr. N. Harrison. Colquitt sued and obtained judgment against Thomas, on his notes, for the purchase money, but not until after the sale of the lands to the claimant. A levy was made on the lands, and a claim interposed by N. Harrison, the last purchaser, and all the questions brought up, were made on the trial of the claim.

[1.] This summary statement is made, for the purpose of introducing a preliminary question, discussed at this bar—one of great practical importance, and affecting, very seriously, the rights of the parties. It is due, therefore, to the merits of the cause, as well as to the distinguished counsel moving it, that it be considered and determined. The proposition of the plaintiff in error is this: Upon the trial of a claim, between the vendor of lands, and a purchaser, claiming under his vendee, it is competent for the plaintiff in execution to set up, by proof, his lien as vendor, and for the Jury to find the land subject, upon that ground, and for the Court to order the land to be sold to satisfy that lien. The vendor's lien is founded in a fundamental principle of Equity—that one who has gotten the estate of another, without paying for it, cannot in conscience keep it. The principle applies not only to the vendee, but to his heirs, and other privies in estate,

and to purchasers having notice that the purchase money is unpaid. The equitable principle is made available, by an implied trust. This lien attaches upon the lands, for the whole, or a part only, of the purchase money. If the whole is due, it attaches for the whole—if a part only, then only for that part. It may be waived by an express agreement between the parties, or without an agreement; as, for example, when the vendor takes independent security for his purchase money, and relies upon that security. When, and under what circumstances, this lien has been waived or displaced, is always an embarrassing question, and not clearly settled by the authorities. So fruitful of litigation is this question, that Lord *Eldon* expressed, upon one occasion, a doubt whether it would not be better to have held, that the lien should exist in no case, or to have laid down the rule the other way, so distinctly, that a purchaser might be able to know, without the judgment of a Court, in what cases it would, and in what it would not, exist. *Mackreth vs. Symmons*, 15 *Vesey*, 340. These general principles being held in the mind, the solution of the question of practice we are to consider, will become the easier. *Story's Eq. Jurisp.* §§789, 1217, 1218. 4 *Kent*, 151, '2, '3, '4. 6 *Johns. Ch. R.* 403. 1 *Ch. Cases*, 39. 1 *Atk.* 572. 3 *Ib.* 273. 15 *Vesey*, 329. 2 *Ib.* 622. 9 *Ib.* 209. 1 *W. Bl. R.* 150. 1 *Johns. Ch. R.* 308. 1 *Sch. & Lefr.* 132. 7 *Wheat.* 46. 10 *Peters*, 625. *Sugden on Vendors*, ch. 18, §1.

To assert this lien, it is necessary, in England, to go into Chancery. So, also, it has been considered and held in this State. Can it be set up, in an issue founded on a claim? We consider that it cannot, without a departure from a practice long acquiesced in—without a violation of the necessary rules of pleading, and without an abandonment of principle. Our proceedings before a Court of Law, upon claims, are *sui generis*, and partake of an equitable character. So far, however, from deriving from that fact an argument in favor of this new practice, I derive therefrom, the reverse inference. If, in a special case, the Legislature has thought fit to clothe a Court of Law with equitable powers, the jurisdiction is a special grant, and is to be confined to the cases in which it is authorized. We have a Court of Chancery, distinct from a Court of Law, differing from it in the principles upon which its jurisdiction is founded—in its mode of procedure—and in the relief which it affords. Until the Legisla-

turs shall blend them into one, and obliterate all these distinctions, for my own part, I shall hold the two Courts, with unswerving strictness, to their respective spheres. A grant of equitable powers, in a specific mode of procedure, so far from drawing with it other equitable powers, upon approved principles, excludes all others. *Ex necessitate*, the trial of a claim is, *quasi*, an equitable proceeding—not made so expressly, by the Legislature, but becoming so in the inherent necessity of the case. According to the usage of the Courts, and the fall current of authority, equitable liens can be enforced only in Equity, by appropriate pleadings, by bringing all the parties interested before the Court, and by a decree which protects the interest of all parties: and in all this, the law is profoundly wise. In this case, what is the issue made upon the record? The plaintiff having ordered a levy upon the land, the purchaser puts in his claim; the Sheriff returns the papers to the *Superior Court*, and there issue is joined. What is that issue? It is expressed on this record, in these words:

“ And now, at this Term, comes the plaintiff in execution, and alleges that the property levied upon by his *fi. fa.* aforesaid, is subject thereto; and for this truth, he tenders this issue, and puts himself upon the country.

“ W. T. COLQUITT, *Plaintiff*.

“ And the claimant denies that the property is subject, and doeth likewise.

“ THOS. A. LATHAM,

“ DAVID IRWIN,

“ WM. EZZARD,

“ *Attorneys for claimant.*”

The record shows no more than this. Upon this dangerously brief and pregnant issue, what is to be tried? The law and the facts *as to the liability of the property to the execution*. The plaintiff asserts that the property is subject to his execution; by which he means to say, that it belongs to the defendant in execution, and, therefore, the lien of his judgment attaches upon it. The claimant denies this upon the record, and the war begins pell-mell. If it should appear in proof, that the plaintiff's judgment is older than the claimant's title from the defendant in exe-

execution, the issue might, or might not, be a simple one. *Prima facie*, the property belongs to the defendant at the date of plaintiff's judgment, and the lien attaches, and the claimant is driven to shew whatever he can shew, to remove the presumption, and to displace the lien. But if the title to the claimant be older than the date of the judgment, (and that is the fact here,) then the plaintiff may proceed to shew, notwithstanding that fact, that the property is the property of the defendant in execution, and liable to his judgment. For example—he may shew that the conveyance of the property, by the defendant in execution, was with intent to delay, hinder and defeat him, as a creditor, and that the claimant had notice of such intention, and claim thereby the protection of the *Stat. 13 Elizabeth*. All those things, and more, may be gone into, upon the brief issue stated. Well might a stranger to our Courts demur to our claim laws, and suggest, that, by appropriate pleadings, these serious issues should appear upon the record. But I advert to them now, to show, that the question made is, whether the property levied on is the property of the defendant, and liable to the lien of the judgment. The plaintiff's burden is to establish that fact; he goes upon the assumption that it is true; and however the issues may multiply, and whatever may be the wanderings of the evidence, still that is the point of departure, and to that it is obliged to return. Now, if this is the issue between the parties, then I say neither by the pleadings, nor upon principle, is the *vendor's lien* involved. Pleadings, to set forth the vendor's lien, there are none—in fact, no pleadings of any kind, except the informal issue which I before transcribed. Nothing is, in truth, put in issue by the record, in a claim case, but the liability of the property to the plaintiff's judgment. The title of the claimant is tried, but no issue is made on the record about that. It is a feigned issue—feigned, albeit it involves title to lands. That the sole legal issue is the liability of the property to the judgment, is proven by the verdict. The finding is single: "We, the Jury, find the property subject"—or, "We, the Jury, find the property not subject;" and by the judgment rendered on it, usually, nothing more, when the finding is for the plaintiff, than a simple order that the execution proceed. Our Act of 1799 requires that the plaintiff's cause of action, and the defendant's answer thereto, shall be plainly, fully and distinctly set forth. Either, when the

vendor comes into Court to establish and enforce his lien, he ought to be required to set it forth fully, plainly and distinctly, or the Statute which requires this to be done is flagrantly disregarded. The same is true of the claimant's defence. The defendant in execution is entitled to be heard against the vendor's lien—he may have waived it—it may be, in part or in whole, satisfied—or he may have taken other security. In a bill, the plaintiff's cause of action would be set forth—the defendant in execution, the claimant, and intermediate purchasers, if any, could be made parties. Their answers would meet the whole case made by the bill—the equities between all the parties could be settled by a single decree, and the whole case would appear of record. According to the proposition of the plaintiff in error, all these matters of claim and defence are to be tried by engrafting upon the claim issue another, or other wholly independent issues. This is all to be done by parol, and the absurdity of the whole thing is conspicuous in this, that the record shows no trace of all this vitally serious litigation. The lien of the plaintiff's judgment is one thing—that of the vendor another and different thing. The judgment is founded on a contract, and its lien is created by Statute. The plaintiff is a creditor, both before and after judgment. The vendor's lien is an equity, which springs out of the sale, but does not exist by contract. He is the *cestui que trust* of his purchaser. The plaintiff's lien is fixed by a judgment, before he moves against the claimant—the vendor's lien is to be ascertained by a judgment or decree, in the issue which he makes with the purchaser, else he can never sell the land. The judgment is conclusive—it cannot be inquired into. The vendor's lien is assailable, and may be resisted. The principles involved are different. Under the Statute of *Elizabeth*, for example, notice to the claimant that the purchase money was unpaid, is only a badge of fraud. Such notice, when the vendor's lien is to be set up, is, *per-se*, conclusive against the claimant's title; and this is the legal proposition which makes this new mode of asserting the vendor's lien, so important in this case. If it were allowed, it is clear, that the claim trial would become inextricably embarrassed; the most important questions that are made before Courts of Justice, would be tried without pleadings and without a record, and the rights of parties would be greatly endangered. Much more might be said in relation to this matter.

We think, that neither the *vendor's lien*, nor any rules or principles of law in relation to it, have any application to this case.

[2.] In opening his charge to the Jury, the presiding Judge said, "that he wished counsel to take notice of his charge, for he supposed the case would be taken up, and if he erred, he could be corrected, and if the Jury found contrary to evidence, they could be corrected." The latter part of these remarks—those that relate to the Jury—is assigned for error. We do not think that the remark complained of is ground of error. In making such a remark, either directly to, or in the hearing of, the Jury, we cannot say that any rule of law is violated. But the propriety and expediency of such a remark is not at all questionable. The finding of the facts is, by law, the duty of the Jury; and it is also the privilege of the parties, that they shall find the facts. This obligation, and this privilege, ought not to be interfered with, either directly or indirectly, by the Court which tries the cause, or by this Court. Whilst it is true, that the Court is clothed with power to grant new trials, upon the ground of a finding contrary to evidence, yet this power does not rest upon any right in the Court to try the facts—it does not become thereby a trier of facts; but it is given to the Court, that any flagrant abuse of the trial of the facts, by the Jury, may be corrected. Such abuse is corrected, not by the Court taking upon itself the correction of the errors committed by the Jury, but by staying its judgment, and awarding another trial, before another Jury. The exercise of this power is confined to exceedingly narrow limits—for the obvious reason, that whilst a power to relieve, against a flagrant abuse of the exclusive function of the Jury in the trial of facts, is necessary and proper, yet they are the sole legally authorized tribunal to pass upon the facts. *Trial by Jury*, by the Common Law and by the Constitution of this State, is, of all other rights of the citizen, the most intangibly sacred. To keep it so, is one of the highest obligations of all the officers of the Government, and more especially of judicial officers. I need scarcely say, that we have no power whatever over the facts of the case. A writ of error does not lie to this Court, upon the verdict of a Jury. A writ of error will lie upon a rule for a new trial, upon the ground, that the Jury found contrary to the evidence; but in that case, it grows out of alleged error in law, in the Court below, in refusing or granting the rule. And one

reason why we cannot approve the remark of the Court, now being considered, is, that without explanation, it left the Jury fairly to infer—taken especially with the preceding remark—that *he supposed the case would be taken up*—that this Court was authorized to review their verdict. I say, then, that the obligation of the Courts is, to maintain, exclusive and unimpaired, the trial by Jury, not in form, but in fact and in substance. To fulfil this obligation, trials before Juries ought to be so conducted as to constrain the Jury to know and to feel that the sole, absolute responsibility of trying the facts, is upon them. They ought, by all the forms of procedure, and by the direct instructions of the Court, to be made to feel, that this responsibility is upon them—that neither the Court below, nor this Court, nor any other power, can share it with them. Each party, even although each has the right of applying for a new trial, is entitled, in the trial of his cause, to the whole intellect of the Jury, the full sanction of their oath, and the industry, and attention, and conscientiousness which a sense of responsibility is sure to prompt and inspire. Any remarks, therefore, falling from the Court, however unintentional, calculated to weaken this sense of responsibility, is wrong. The remark made by the Court in this case, was calculated to work this effect. To tell them, or to say in their hearing, that if they found contrary to evidence, their verdict could be corrected, was to inspire in them a belief that the final responsibility of the verdict was not upon them; and most men could not prevent the effect, more or less, of such a belief, on their conduct in the jury-box.

[3.] The Judge instructed the Jury, “that fraud was never to be presumed, though it might be proven by circumstances.” To this instruction, the plaintiff excepts. I cannot see why. In a Court of Law, fraud cannot be presumed. There is no doubt about that. It may be proven by positive testimony. The Judge affirms nothing against that. He only goes farther, and says, that although it cannot be presumed without proof, yet it may be proven by circumstances. We see no error here.

[4.] The presiding Judge farther instructed the Jury, that “to hear reports about an incumbrance, did not amount to sufficient notice in Law;” and to that charge, the plaintiff has excepted. It will have been seen, that the effort of the plaintiff in execution, in this case, was to set aside the title to the claimant, under the

Statute 13th Elizabeth. He was bound, therefore, to prove that the sale, by the defendant in execution, was made to defraud him, a creditor, and that the claimant, and those (the intermediate purchasers,) under whom he held title, had notice of the fraud. Notice was sought to be brought home to the claimant, by proving that he had been informed that Judge Colquitt, the plaintiff in execution, had some claim upon the land; and it is no doubt to this testimony that the Court alludes, in this part of his instructions to the Jury. Whether the claimant bought with notice or not, is a fact to be left to the Jury. What facts or circumstances were evidence of notice, was for the Court to determine. He held, that "to hear reports about an incumbrance, did not amount to *sufficient* notice in Law." It is very clear, that to hear a report—to be told that there was an incumbrance on the land—is not *sufficient* notice in Law, of itself, to set aside the claimant's title. *Sugden on Vendors, top p. 315.* Whether to hear a report of an incumbrance, be admissible, even as a fact from which the Jury might infer notice, is altogether questionable. Indeed, I find no authority going that extent. That the claimant heard the report, is a fact which may be susceptible of proof. A report is not, however, a fact. Rumor or report does not prove a fact. Proof that one hears that a thing is so—that a fact exists—does not prove the fact—it does not charge the mind with knowledge of the fact. The most dangerous consequences to the rights of property, might be justly apprehended, if they were left to be determined upon rumors, which are proven to have reached the ear of parties. They are but hearsay, and prove nothing, except in certain excepted cases, of which this is not one. The argument in support of this exception in part, was, that the Judge failing to specify what was report, the effect of the charge was to exclude from the consideration of the Jury, such facts proven, as are legitimate badges of fraud. This inference is not a fair one. The word report explains itself: *report about an incumbrance* is itself explicit, and perfectly intelligible. The Jury were, it seems to us, obliged to limit the application of the instruction to the evidence of reports. There is no error in this instruction.

[5.] The Court was requested to give to the Jury a certain charge. Whether the request and the legal proposition were presented verbally or in writing, the bill does not disclose. The bill states the rule of law, which was desired to be given in charge

to the Jury, and that the Judge, being requested to charge it, replied, "Well, I charge it." The *manner* of this charge is excepted to. If there were no other ground upon which this cause ought to be remanded, we should be constrained to send it back upon this—because we believe that the manner of this charge is violative of principle. That the actual scene, at the time when this charge was made, was such as to excuse the manner in which it was given, and to divest it, in the view of eye-witnesses, of something of its objectionable character, we can readily imagine. We, however, can view it in no light but that in which the record presents it. It is not necessary to repeat here, what the rule of law was, which was requested to be given in charge to the Jury. Suffice it to say, that the Judge himself recognized it to be a sound principle of law, and also recognized the right of the plaintiff in error to have it presented to the Jury; and no doubt he considered that he did present it to the Jury. He did charge it for certain purposes. For example, he would, under the circumstances, scarcely be liable to a writ of error in behalf of the plaintiff, for refusing to charge according to the request; and he would have been liable to a writ of error, at the instance of the other side, for having charged according to the request. To this extent—for these ends—the charge, perhaps, may be considered as sufficient; but as an *instruction to the Jury*, we consider it, in effect, no charge, and a virtual denial to the plaintiff in error, of his right to have the rule of law, which he considered applicable to his case, and, indeed, which was so considered by the Court, laid before the Jury for their guidance in passing upon the evidence.

The Court is the exclusive judge of the law in civil cases. As the Court may not interfere with the evidence, so the Jury may not interfere with the law. The Jury are bound to obey the law, as given in charge to them by the Court. I lay this down without any qualification. They are bound, according to the organization of our Courts, to apply the evidence, under the law, as administered to them by the Court. They have no right to sit in judgment on the law. Hence, if the Jury find contrary to a correct rule of law, given them in charge, the verdict will be set aside, and a new trial awarded. Nay, I go farther. If an erroneous rule of law be given them, *they must abide it*. The correction of the error in the law is not with them; it is a power

deposited elsewhere. The Court may correct his own errors, by granting a new trial; and if he will not, this Court is organized as the final corrective tribunal. Any want of distinctness between the powers of the Court and the Jury, would be ruinous to the entire system. This is the theory, and never was theory based upon more impregnable principle. And the theory is carried out in this State, with great fidelity, in practice, particularly by the Juries. There are occasional departures. Occasionally, a Jury, or Juries, persist in disregarding the law of a case. But the instances are rare. On the contrary, the Juries expect, desire, and lean upon, the legal instructions of the Court. They wait upon the directions of the Court—they receive the rules of their appropriate action from the lips of the Court. They hang upon the words he utters, with intense interest, and strain to unwonted tension the whole of their faculties, clearly to understand them. As conscientious men, charged with the most eventful responsibilities, and not educated and trained in the law, they could not do otherwise. It is, therefore, the duty of the Court, to charge them as to the law—a duty from which he cannot escape. Not only so; but it is equally and necessarily his duty so to give the law in charge to the Jury, as that they shall understand his instructions. They are learners from him; he is their instructor. For obvious reasons, it has been with the Courts, and it ought ever so to be, a matter of pains-taking, to make their instructions plain and perspicuous. For myself, I know of no duty of the Bench more important than what is usually called the summing up, which embraces a clear summary of the facts, and a lucid statement of the law. And next to a strong comprehension of what the law is, stands, in practical importance, a faculty of presenting it intelligibly to unprofessional minds. If these things be so, then, according to these views, how stands this matter? 1st. Were the Jury plainly and intelligibly instructed, as to the law which the plaintiff asked might be given in charge? 2d. According to the manner in which the charge was given, had the plaintiff the benefit of that rule of law, in the action of the Jury upon his case? They were not instructed at all; there was no presentation whatever to them, of the legal principle; their attention was not called to it; no address was made to them. All that was said, was this: "Well, I charge it;" and this remark was made in response to the re-

quest of counsel, and, we are obliged to believe, made to the counsel. It is not sufficient to reply, that both the request and the response were made in the hearing of the Jury. This reply assumes that the Jury could, and did as well understand the legal rule thus heard, as if they had received it in the form of a clear and solemn presentation, directly from the Court to them. This assumption is wholly without foundation. The presumption is, that they imperfectly heard, and did not, because, in the very nature of the case, they could not, understand it. It is not always the case, that an able Judge even can understand the full effect of a legal proposition, when first presented. He sometimes requires a re-statement—perhaps an argument. It is unreasonable to suppose that an untrained Jurymen, in the midst of the stir and excitement of the court-room, can understand and practically appreciate a rule of law, as read or recited to the Court, by the counsel from his desk. His attention, it may be presumed, was not fixed upon it, for the reason, that he expected to be instructed upon it by the Court, in solemn form.

If the Jury did not understand the rule of law which was thus imperfectly charged, it could not, of course, become to them a rule of action in their application of the evidence; and the case stood as though there had been no attempt whatever to charge it. If so, the second interrogatory is answered. The plaintiff had not the benefit of the rule of law which he believed, and which the Court held, was applicable to his case; and for that reason, we hold that the manner in which this charge was given, is error. *Hall vs. Hall*, 6 Gill. & Johns. 386. *Selin vs. Snyder*, 11 S. & R. 319. 3 Cranch, 298. 3 Blackf. 433. *Powers vs. McFerron*, 2 S. & R. 44. *Smith vs. Thompson*, Ib. 49. *Hamilton vs. Menor*, Ib. 70. *Livingston et al. vs. Maryland Ins. Co.* 7 Cranch, 506.

[6.] The next exception is to the admissibility of the evidence of the witness Russel. He swears that he saw the claimant pay a large sum of money to A. H. Harrison, and that he understood from the claimant, A. H. Harrison and Clayton Williams, that the money was in payment for a parcel of land that claimant had bought from A. H. Harrison & Clayton Williams, known as the Pondtown Place, in the County of Campbell, and that the claimant gave to Harrison & Williams five thousand dollars for said land, as he understood from the claimant and Harrison & Wil-

liams. This witness was introduced by the claimant, to support his title, by showing the *bona fides* of the purchase. He bought from Harrison & Williams, who bought from Thomas, the defendant in execution. The testimony goes to show that he paid for the land, and how much he gave for it. The objection is to proof of the *sayings* of Harrison & Williams, and the claimant. The interview between the witness and these parties, was *after* the claimant had bought the land in question, from Harrison & Williams. It occurred in the summer of 1845, and the claimant bought in May, 1845. The sayings of these parties are not admissible as part of the *res gesta*, at the sale of the lands to the claimant, because they were not contemporaneous with the transaction. The sayings of the *claimant* are not admissible, in support of his title, unless they are part of the *res gesta*. Here they are not. Nor are the sayings of his vendors, in support of his title, uttered after they had sold and parted with all their interest in the land, admissible. What the witness *understood*, therefore, at that time, from these parties, is, in our judgment, incompetent testimony, and ought to have been rejected. So far as the testimony goes to prove facts—the payment of the money, for example—it is competent.

As to the testimony of L. B. Watts, we think the Court was right in rejecting it. It was afterwards read by consent, at the suggestion of the Court—he expressing doubt as to the correctness of his decision, and saying, at the same time, in the hearing of the Jury, *that it did not amount to much*. This remark is made the ground of an assignment. Without laying too much stress upon every casual remark that may fall from the Court, in communicating with counsel in the progress of a cause, we are of opinion, that whilst this remark, thus made, is not ground for error, it might as well have been omitted.

As before stated, Judge Colquitt having reduced his claim against his vendee, Thomas, for the purchase money of the Pond-town lands, to judgment, was seeking to subject them. Thomas, pending the suit against him, had sold the lands to a company, known in this record as Harrison & Williams, who sold, pending that suit, to the claimant, Nathaniel Harrison. Colquitt's judgment being younger than the deed to the claimant, and, also, than the deed to the claimant's vendors, Harrison & Williams, his effort was to show, that the original sale from the defendant in exe-

tion, to Harrison & Williams, was void; because made to hinder, delay and defraud him, as a creditor, under the Statute 13 *Elizabeth*, and that the purchasers from Thomas had notice of the fraudulent intention—whilst the claimant, on his part, sought the protection of the exception in that Statute, in favor of *bona fide* purchasers, for value, without notice. His effort, therefore, was to prove the *bona fides* of his purchase, and that he had no notice of the fraud. Such was the principal grounds of contest in this cause, and a large volume of testimony was introduced, directed to these points. The Court gave to the Jury several instructions relative to the question of notice, which are excepted to. In reviewing the instructions of the Court upon this head, in justice to the Court, I remark, that an effort seems to have been made by the counsel for the plaintiff, to secure to him the benefit of the rule, as applicable to a contest between the vendor, seeking to set up his lien, and a purchaser from his vendee—whilst it is very obvious, that the purpose of the Court was to exclude that rule from the case, and to hold the parties to the rule of notice, under the Statute of 13 *Elizabeth*.

Examining into these instructions with diligence, we are satisfied, that in more than one instance, the charge of the Court is susceptible of such a construction, as denies to the plaintiff the benefit of certain testimony which, under the law, he was entitled to. Whether, in fact, the Jury did allow the full effect of this testimony, is what we cannot determine; but as their verdict is against the plaintiff, we have a right to presume that they did not. I do not mean to say that, in my opinion, the plaintiff ought to have recovered—I express no opinion about that—I only mean to say, that inasmuch as the instructions of the Court are susceptible of a meaning adverse to the rights of the plaintiff, and inasmuch as the Jury found against him, it is a fair inference that they understood them in that adverse meaning.

[7.] The plaintiff was bound to prove in this case—

1. That the sale, by Thomas, was fraudulent; that is, that it was made to *hinder and defeat* his debt. He was bound to prove a fraud, *in fact*. To prove this, he was entitled to give in evidence certain facts—as the pendency of his suit at the time of the conveyance—possession retained by Thomas, and other facts of like character, which the law recognizes as *marks or badges* of

fraud. See 2 Kelly, 1. From these facts, the Jury are left to ascertain the *bona fides*, or the *mala fides* of the sale.

[8.] 2. He was bound to prove that Harrison & Williams and the claimant, both had notice of the fraudulent intention of Thomas, in his sale to Harrison & Williams.

[9.] I say *both*, because the rule is, that one who buys from a fraudulent grantee, *bona fide*, and *without notice*, will be protected. So, also, if one buys from an *innocent* grantee, *with notice*, he will equally be protected; that is to say, if the claimant bought from Harrison & Williams, *without notice* of the fraud, his title will be good against Colquitt's judgment, although they bought from Thomas, *with notice*. So, also, if the claimant bought *with notice*, and they bought *without notice*, his title will be good—so that both the claimant and his vendors must be charged with notice. This is the rule, both under the 27 and 13 Elizabeth. The rule has been held different in New York, and, also, in Connecticut and North Carolina, under the 13 Elizabeth. In *Roberts vs. Anderson*, Chancellor Kent held, approving the decision of the Supreme Court of Connecticut, in *Preston vs. Crofut*, (1 Conn. R. 527, note,) that inasmuch as the Stat. 13 Eliz. made a conveyance to defeat creditors *utterly void*, a purchaser from the debtor, buying with notice, acquired no title, and could convey none, even to a purchaser without notice. It seems to have been so held, also, in North Carolina. See *Hoke vs. Henderson*, 3 Dev. 12 to 16. In New York the Chancellor has been overruled, and unless in Connecticut and North Carolina, no distinction now obtains between the Stat. 27 and the Stat. 13 Elizabeth. The rule, under both Statutes, by the preponderance of authority, is as I first above stated it to be. 3 Johns. Ch. R. 372. 3 Dev. 12 to 16. 1 Conn. 527, note. 18 Johns. R. 515. 9 Paige, 132. 2 Mason, 252. 1 Sumner, 507. 2 Pick. 184. 12 Idem, 307. 3 Metcalf. 332. 8 Idem, 411. 8 Watts, 489. 3 Penn. 160. 18 Maine, 391. 2 N. Hamp. 402. 7 Dana, 506. 5 Missouri, 296. Note to *Hopkirk vs. Randolph*, 2 Brock. 152, '3. 3 Kelly, 448.

To prove the fraudulent intent of Thomas, the pendency of the suits against him is a competent badge, and in this case ought to have been submitted, with its full effect as such, to the Jury. The fraud, on the part of Thomas, was a preliminary fact, to be established—notice to the claimant and his vendors, of the fraud, could not be established, unless the fraud itself was proven. The pen-

dency of the suits, was, also, a fact to be left to the Jury, to show notice to them—it was an *indicium*, from which notice might be inferred—for they bought whilst the suits were pending. Of itself, it is not notice; and I apprehend that the pendency of the suit, in favor of the plaintiff, was legitimate evidence, to the extent stated, to show notice whether the record of the case pending, showed the consideration for which the notes sued on were given or not. The consideration really has nothing to do with the matter. The facts to be arrived at in this case were, was the plaintiff a creditor of Thomas—no matter upon what consideration—was the conveyance by Thomas made to defeat him as a creditor, and had the claimant and his vendors notice of a fraud against the plaintiff, as a creditor? In an attempt to enforce the vendor's lien, it would not, of course, be enough for a vendor to exhibit the notes of the vendee. He would be held to go farther, and prove the sale of the land, and if the notes became material testimony at all, I apprehend they would avail nothing, unless proven to be given for the land; but in this case, let it be remembered, that we have nothing to do with the vendor's lien. Now, what did the Court charge as to the pendency of the suits? He charged, "that the pendency of the suits did not operate as notice, either positive or constructive, for the notes did not express the consideration for which they were given; and although the plea did set forth that fact, yet the plea was not verified, and, if taken at all, would have to be taken together, and it set forth a partial failure of consideration." In the view I have presented of the *lis pendens*, as a badge of fraud, and as evidence of notice to the purchasers, there was error in this charge. It is true, that the pendency of the suits was not notice, positive or constructive; that is, not such notice, in law, as would be conclusive upon the claimant. In that construction the Court was right; but it was competent evidence, as a fact or circumstance, from which the Jury might infer notice. It was the right of the plaintiff, that the Jury should be allowed to consider of it. Were they so instructed as to lead them to believe that they were at liberty to consider the pendency of the suits as evidence for any purpose? We think they were not. It being in reference to a vital point in the case, the charge ought to have been more explicit. We think the Jury may have construed this charge, as withdrawing from their consideration, altogether, the fact that the suits were pend-

ing at the time when the claimant and his vendors purchased. They ought to have been told, that the pendency of the suits, although not conclusive in law, or in fact, as to notice, yet was a fact which they were at liberty to consider, in determining, in connection with the other evidence in the case, whether they had notice or not; and this, wholly irrespective of the reasons given by the Court, as to the consideration of the notes sued on, and the plea.

[10.] Farther, the plaintiff's counsel requested the Court to instruct the Jury, "That if they believed, first, that the deed to Harrison & Williams, made by the defendant in *fa. fa.* was fraudulent as to creditors, and that Nathaniel Harrison, the claimant, knew of the indebtedness of the defendant, Thomas, to the plaintiff for the purchase money of the fractions, and of Thomas' insolvency, and the pendency of the suits, at any time before he paid the purchase money and received a title, that a deed taken after such notice would not defeat the incumbrance, and that such deed would be fraudulent in law." The Court refused to charge as thus requested, and we think correctly.

In this case, a deed taken after knowledge of the plaintiff's incumbrance, of Thomas' insolvency, and of the pendency of the suit—such knowledge being before the payment of the purchase money—would not, necessarily, defeat the incumbrance. *That* part of the instruction asked is true; yet it is not true that the deed would be fraudulent in law. I repeat, that the fraud to be proven, is a fraud in fact; and the notice to be charged upon the purchasers, is notice of this fraud in fact. The fraud being proven, and notice of it carried home to the purchasers, they become parties to the fraud, and the law adjudges, then, that their title is not good. The fact of fraud, and the fact of notice, are to be submitted to the Jury. Hence, if the knowledge of the incumbrance, of Thomas' insolvency, and of the pendency of the suits, be proven, those facts do not, as of legal necessity, annul the deed. I am aware, that the desired instruction assumes that this sale was fraudulent. Let that be so; still, knowledge of these facts, to wit: Colquitt's debt, Thomas' insolvency, and the pendency of the suits, does not, necessarily, make the deed to claimant void. Whether void or not, is the issue upon the question of notice, and these facts are submitted to the Jury upon that issue. Upon the requisition in the request, that upon knowledge of these

facts the claimant's deed be charged to be fraudulent, the Court is invoked to determine the issue as to the notice. He did not err in not responding favorably to the invocation. He, however, in response, charged, "that if any considerable part of the purchase money had been paid, and the contract of purchase complete, before notice, that the claimant was not compelled to stop, but had a right to go on and take a deed, which deed would, *in no wise, be affected by the notice in this suit*, the plaintiff averring that he did not rely upon his lien in Equity." The lien in Equity being out of the question, it remains to inquire, whether there be any error in this instruction? When a purchaser goes into Equity, for relief against a prior incumbrance, upon the ground that he is a *bona fide* purchaser, without notice, he will not be relieved, if he has notice before he pays all the purchase money, although he has paid a part. The rule in such a case goes thus far, to wit: notice before actual payment of all the purchase money, although it be secured, and the conveyance actually executed, or before the execution of the conveyance, notwithstanding the money be actually paid, is equivalent to notice before the contract. 2 *Sugden on Vendors*, top p. 312. 3 *P. Wms.* 387. 2 *Atk.* 630. 1 *Johns. Ch. R.* 288. 1 *Munf.* 38. 7 *Johns. Ch. R.* 65.

I do not mean to say, that this rule applies in this case. In the case put by the Court, he says, that the purchaser may go on and take his deed. True, he may; but he proceeds to say, that in such a case, notice *would in no wise affect the deed*; that is, in a case where a considerable part of the purchase money is paid—the contract of purchase being complete—the purchaser then receiving notice, before the balance of the purchase money is paid, and before the deed is taken, the deed will in no wise be affected by the notice. We do not agree with the Court in this idea. The purchaser may go on, in such a case, to take his deed, and as against a prior incumbrance, with notice, it would not avail him in Equity; and here, we think, he takes it at the peril of its being set aside *for notice of the fraud*. We mean to say, that in the case put by the Court, at Law, as here, the facts going to show notice of the fraud, may be submitted to the Jury, and to this extent and no farther, we think this charge wrong.

[11.] In relation to the statements of Clayton Williams, upon a close inspection of the record, the only point determined by the Court was, that his statements could not be given in evidence, to

prove his own agency—he being a competent witness to prove his agency. This ruling was at the request of the claimant. To this proposition the plaintiff does not object. The objection is to this remark of the Court, recited in the bill, made to the Jury, to wit: “testimony can be legally admitted for one purpose, and when so admitted, cannot be made evidence for a different purpose, and the sayings of Clayton Williams, made after his actings in that capacity, while purchasing, cannot be admitted to prove his agency, he being a good witness for that purpose.” We find no error in the ruling or the remark.

Let the judgment be reversed.

No. 46.—JAMES HOLMES, administrator, plaintiff in error, vs. JOHN LIPTROT, administrator, defendant.

[1.] Where L and T executed a marriage settlement, in contemplation of marriage, in which L, the intended wife, declared that it was her desire that all her property should be kept and assured to her *separate use* and enjoyment forever, and that her trustee should keep, preserve, and assure the same forever unto L, the intended wife, to her *entire and free* use, control and benefit, free and exempt from all debts of T, the intended husband, now existing against him, or which shall hereafter exist; and T, the intended husband, assented and agreed thereto, in consideration of the intended marriage, and the further consideration of one hundred dollars, received from his intended wife as a marriage portion: Held, on a bill filed by the administrator of the husband, against the administrator of the wife, to compel the latter to make distribution to the representative of the husband, that the husband, by the words and clear intention of the marriage settlement, not only relinquished and abandoned his marital rights to his intended wife's separate property, during the coverture, but forever, without limitation of time; and that the administrator of the wife was entitled to retain the property, and after the payment of the wife's debts, to distribute to her children.

Bill for discovery, account, &c. in Houston. Decision by Judge STARK, at October Adjourned Term, 1849, to wit: in January, 1850.

This bill was filed by James Holmes, as administrator of Henry Talton, against John Liptrot, as administrator of Camilla Talton, deceased.

Camilla Talton—while the widow Liptrot—entered into an ante-nuptial settlement with Henry Talton, the material parts of which are as follows: “The said Camilla being desirous of enjoying, maintaining and keeping all and singular her lands, negroes, and other property, real and personal,” &c. also, what “shall be received from her father’s estate, at his death, in case she should then be living, separate and distinct from all the property of her said intended husband,”—“and being desirous that all her said property shall be kept and assured to her separate use and enjoyment *forever*; and the said Henry Talton hereby assenting and agreeing thereto, in consideration of the marriage portion aforesaid, (\$100) and of said intended marriage,” it was agreed that the trustee should “keep, preserve and assure the same *forever* unto said Camilla, and to her entire and free use, control and benefit, free and exempt from all and every liability, obligation or charge of judgments, debts, demands, or contracts, now existing, or which shall hereafter exist, against said Talton.”

And said Talton “covenants and agrees that he will not oppose or obstruct the said trustee in the due and proper execution of his trust, but will aid him in behalf of said Camilla.” Signed by the parties and the trustee also.

Camilla died—her husband surviving her. Talton afterwards died in possession of the trust property. John Liptrot administered on Camilla’s estate, and J. Holmes on Talton’s estate. Liptrot, in trover, had recovered the property (slaves) from Holmes, who now files this bill in right of the intestate husband—claiming his right to the sole administration, without accountability, of his deceased wife’s estate.

That part of the Court’s charge excepted to, is as follows: “It is the opinion of the Court, that a legal construction of this contract hinders, at once and *forever*, the dominion of the husband, as well as all his then present and future creditors, from any and all right to this property; and that after the payment of the debts of Camilla, and the expenses of administration, it must descend, as it ought, to her children.”

Complainant requested the Court to charge, that unless the settlement made provision for the property vesting in the children

of said Camilla, after her death, or in some other way, made a limitation over, that the husband was entitled, after her death, to recover it, as her administrator, and his representatives are now entitled to recover from defendant, which the Court refused.

And to this, complainant's counsel also excepted, and thus the case comes up.

FOX and GILES, for plaintiff in error, cited the following authorities:

1 Kelly, 389. *Rochell vs. Tompkins*, 1 *Strobhart's Eq. R.* 114. 1 *McMullan's Eq. R.* 201. *Allen vs. Rumph*, 2 *Hill's Ch. R.* 1. *Barkins vs. Giles, Rice's Eq.* 315. *Stewart vs. Stewart*, 7 *John. Ch. R.* 229. *Pickett vs. Chilton*, 5 *Munf. R.* 467.

S. G. HUNTER and S. T. BAILEY, for defendant, cited—

Broom's Legal Maxims, 120, 198. 16 *John. R.* 172. 2 *Black. Obs.* 209, 241. 8 *Bacon*, 274, 280. 9 *John. R.* 123. 3 *Vearry*, 246. 4 *Ga. Rep.* 377.

By the Court.—WARNER, J. delivering the opinion.

[1.] This is a bill filed by the administrator of Henry Talton, against the administrator of Camilla Talton, for distribution of the estate of Camilla Talton, in the hands of her administrator. It appears from the record, that in the year 1834, Henry Talton and Camilla Liptrot entered into a marriage settlement. Camilla Liptrot was then the widow of Hopkins Liptrot—had one child, and was possessed of considerable property; that she intermarried with Talton, and died, leaving her husband, Henry Talton, and two children by the latter marriage, surviving her. Camilla Talton died intestate. Subsequently, Henry Talton died intestate, without having taken out administration on his wife's estate. The record also shows, that independent of the separate estate of Camilla Talton, his former wife, the estate of Henry Talton was not sufficient, by several thousand dollars, to pay his debts.

The great question in this case is, whether the administrator of Camilla Talton can be compelled to make distribution to the administrator of Henry Talton.

The decision of this question must depend on the construction to be given to the marriage settlement. If, by the terms of that settlement, the marital rights of Henry Talton to the property of his intended wife, Camilla, were not *forever* relinquished and abandoned, but only suspended *during the coverture*, then, upon her death, without having made any disposition of the property in her lifetime, the marital rights of the husband would attach to the property, by operation of law, and the complainant is entitled to recover. *Stewart vs. Stewart*, 7 John. Ch. Rep. 229. But if, by a fair and liberal interpretation of the words of the marriage settlement, Henry Talton not only relinquished and abandoned his *marital rights* to the property of his intended wife, *during the coverture*, but *forever*, then his administrator is not entitled to recover, for he is bound by the contract of his intestate.

It has been insisted on the argument, that the right of the complainant to recover, was settled by the judgment of this Court, in *Liptrot vs. Holmes*, 1 Kelly, 381. The question made by the record in that case was, whether the administrator of Camilla Talton was entitled to maintain an action of trover, for the recovery of certain slaves, or whether the *legal title* to the slaves was in the *trustee* of Camilla Talton, under the marriage settlement.

This Court held, that the *legal title* to the property was not in the *trustee*, but in the administrator of Camilla Talton, and that he had the *right* to reduce the property into his possession, as her administrator; but the *question as to whom* the administrator of Camilla Talton should make *distribution* of the property, when reduced to his possession, was not made by the record in that case, nor was that question considered or adjudicated by this Court. We will now proceed to consider the marriage settlement executed by the parties in 1834, in contemplation of their intended marriage.

After reciting the property of which Camilla Liptrot was possessed and in expectancy, the contract further recites: "Whereas, a marriage is this day intended to be had and solemnized between the said Henry Talton and Camilla Liptrot, with whom the said Henry is to have and receive the *sum of one hundred dollars in money, as for her marriage portion*; and the said Camilla Liptrot, being desirous of enjoying, maintaining and keeping all and singular the lands, negroes, and other property, real and personal, which shall be assigned to her on distribution of the estate

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of said Hopkins Liptrot, deceased, and also, all and singular the property, real and personal, that shall be given to her by her said father, Aquilla Liptrot, and also, which shall be received by her from her father's estate after his death, in case she should then be living, and the increase of said property, separate and distinct from all such property, real and personal, as shall be acquired, claimed or owned, or which is now claimed or owned by the said Henry Talton, her intended husband, in the event of their intended marriage. And the said Camilla Liptrot being further desirous that all and singular the said property, and increase thereof, when assigned or delivered to or received by her, as hereinbefore contemplated, shall be kept and assured to her *separate use and enjoyment forever*; and the said Henry Talton hereby assenting and agreeing thereto, in consideration of the marriage portion aforesaid, and of the intended marriage—it is, therefore, covenanted and agreed by and between the parties to these presents, in manner and form following: that is to say, the said Henry Talton and Camilla Liptrot have made, constituted and appointed, and do, by these presents, make, constitute and appoint the said John Liptrot, trustee for the said Camilla, and for all and singular her property, real and personal, hereinbefore referred to, and of the increase thereof, to keep, preserve and assure the same *forever* unto the said Camilla, and to her entire and free use, control and benefit, free and exempt from all and every liability, obligation or charge of any and all judgments, debts, demands or contracts now existing, or which shall *hereafter* exist, against him, the said Henry Talton. And for the full, faithful and perfect performance of every part of this agreement, the parties bound themselves," &c. See the entire agreement, 1 *Kelly*, 382.

"Marriage settlements," says Chancellor *Kent*, "usually proceed from the prudence and foresight of friends, or the warm and anxious affection of parents; and if fairly made, they ought to be supported, according to the true *intent* and *meaning of the instrument* by which they are created. A Court of Equity will carry the intention of these settlements into effect, and not permit the intention to be defeated." 2 *Kent's Com.* 165. *Methodist Episcopal Church vs. Jacques*, 3 *John. Ch. Rep.* 88. In *Horry vs. Horry*, (2 *Dessaussure's Eq. Rep.* 125) the Court said, "in marriage settlements, the most *favorable exposition* will be made of words, to support the *intention* of the parties."

It is true, that the *intention* of the parties cannot *control the law*, but it is legitimate to look into the instrument for *words*, as evidence of the *intention* of the parties, so as to take it out of the general rule of law, as to the *marital* rights of the husband; especially when there are children of the marriage unprovided for, as in this case. In *Groves vs. Clark*, (15 *English Ch. Rep.* 140) the *Master of the Rolls* said, "that a settlement upon a married woman is, without a special agreement to the contrary, always understood to invoke a provision for the children." But here, we must be governed, as to what was the *intention* of the parties, by the *words* of the instrument. Was it the intention of the parties, that the *marital rights* of Henry Talton, to the property of his intended wife, should only be suspended *during the coverture*, as in the case of *Stewart vs. Stewart*; or did the parties look *beyond* the termination of the coverture? It is to be remarked, that by the terms of the settlement, the husband is not even to have the use of any portion of the property *during the coverture*. In what manner does the instrument declare Camilla Liptrot is desirous to secure the property to her separate use and enjoyment? Does she only desire to have it so secured *during the coverture*? The words of the instrument answer the question, by declaring the parties intended it should be secured to her separate use and enjoyment *forever*. She is not only desirous that the property shall be secured to her separate use and enjoyment during the coverture, but *forever*; that is to say, it is never to belong to Henry Talton, in any event whatever. Such is her declared *intention*, in our judgment, by a fair and liberal construction of the *words* of the instrument. To which declared intention, Henry Talton, her intended husband, *assented* and *agreed* thereto, (as the words of the instrument declare) in consideration of the one hundred dollars, which she paid him as a marriage portion, and in consideration of the intended marriage. Her proposition to him is, in substance, (as it appears from the instrument) I will marry you, and give you one hundred dollars, as a marriage portion, provided you will *forever* relinquish all claim to my property.

To this proposition, the intended husband appears to have *assented*, and his administrator is now bound by the stipulation of his intestate. The stipulation, as to the protection of the property from the *debts* of Talton, evidently looks *beyond* the termination of the coverture. The property is not only to be protected

against the debts of Talton during the *coverture*, but *forever*. The true intent and meaning of the parties to this marriage settlement undoubtedly was, from the words of it, that neither Talton nor his creditors, should ever have the benefit of his wife's separate property, either during the *coverture*, or at any *other time*. Talton, the intended husband, did not, nor did he intend, by the words of the instrument, merely to abandon his marital rights to the property *during the coverture*, but he did, and so intended, to abandon them *forever*, for the consideration stated. The only two cases cited on the argument, most analagous to this, were, *Baskin vs. Giles*, *Rice's Eq. Rep.* 315, and *Suggs vs. Tyson*, 2 *Hawk's Rep.* 472. In *Baskin vs. Giles*, the Court were divided in opinion, and in *Suggs vs. Tyson*, it was held, the marital rights of the husband were defeated. In the view which we have taken of this marriage settlement, we hold, that Henry Talton abandoned his marital rights to the property of his intended wife, not only *during the coverture*, but *forever*, without any limitation of time; and that her administrator is entitled to retain the property, and after the payment of debts, to distribute it to the children of his intestate.

Let the judgment of the Court below be affirmed.

No. 47.—HENRY M. BUCKNER, plaintiff in error, vs. WILLIAM H. LEE, et al. defendants.

- [1.] Upon an agreement between A and B, that A should take certain negroes of B, and work them in a blacksmith's shop, furnish all supplies, pay all expenses, and give B one-half of the net proceeds of the shop, for the use of the negroes: *Held*, that as to third persons, A and B are partners.
- [2.] If the business of a firm is conducted by one of the partners, and his name is the name of the firm, and a note is made by that partner in his name, the firm will be liable thereon, if it is proven that the note was made as a note binding the firm, or that the consideration of the note was for the benefit, and in the course of the business of the firm, and that the payee be-

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Heved these things, and the maker sanctioned his belief by his acts and representations.

[3.] If money is borrowed, or a purchase made by an individual member of a partnership, and his note is given therefor, it is, *prima facie*, the debt of the individual; but the holder, in an action against the firm, for the consideration of the note, may rebut this presumption by proof; and if it appear that the credit was given to the firm, and not the individual, if the money or the property went to the use, and in the course of the business of the firm, it will be liable. If, however, the credit was given to the individual, the firm will not be liable, although the money or property went to the use and in the course of the business of the firm. In that case it will be held an advance by the individual member to the firm, and he will become the creditor of the firm.

Assumpsit, in Houston. Decision by Judge STARK, at October Adjourned Term, 1849—January, 1850.

Henry M. Buckner brought this suit, on a note for \$282, (signed by William H. Lee, alone,) against James A. Everitt and William H. Lee, charging them as partners.

It appeared that Lee was a blacksmith, and he and Everitt agreed, that Everitt was to put in with Lee, some negroes to work with him in his shop; that Lee was to "furnish all supplies, pay all expenses, and give Everitt one-half the net proceeds, for the use of the negroes." It did not appear that Everitt furnished any tools or materials, or of his having paid, or agreed to pay, any of the expenses. On a settlement between the parties, Lee reserved money to pay the debts due by the concern. Lee gave his notes for the wood work of wagons, which were *ironed* in the shop, and sold by him; that Lee said he and Everitt were in the blacksmith business together, and *ironing wagons*. Some patrons (or one) paid accounts to both Everitt and Lee. One witness saying, he "never heard it called any other than Everitt & Lee's shop."

The plaintiff, after making above proof, and introducing the note, closed. Defendants moved a non-suit, on the ground that there was no sufficient case made to carry it to the Jury; that Everitt's estate was not liable, (Everitt had died and his representative been made a party.) The Court sustained the motion—to which plaintiff excepted, and brings up the case on that ground alone.

A. P. POWERS, for plaintiff in error, cited—

Bissett on Partn. 442. 16 *Wend.* 505. 17 *Sergt. & R.* 2. 2 *H. Bl.* 235. *Collier on Partn.* 43. 2 *W. Bl.* 99, 999. *Smith's Lead. Cases*, 614, 615. 18 *Ves.* 301.

HUNTER, for defendant.

By the Court.—NISBET, J. delivering the opinion.

The presiding Judge non-suited the plaintiff, upon the ground that there was not evidence adduced, in support of his action, sufficient to carry it to the Jury.

[1.] The action was brought to recover a sum of money, alleged to be due by Lee and Everitt, as partners in the blacksmith's business. In support of his action, the plaintiff proved, that Everitt and Lee entered into an agreement, by virtue of which, Lee was to take Everitt's negroes, work them in the shop, furnish all supplies, pay all expenses, and give Everitt one-half of the net proceeds of the shop, for the use of the negroes; that the business was conducted by Lee; that the shop was understood to be the shop of Everitt & Lee; that a part of the business conducted by them was, *ironing wagons* for sale. A note made by Lee, and payable to the plaintiff, which was proven to have been given for the wood work of wagons, was in evidence. There was, also, evidence going to show, that at the time this note was given, Lee, the maker, represented to the plaintiff, that himself and Everitt were conducting the smith's business together, and that a part of their business was the *ironing of wagons*. With this proof the Court non-suited the plaintiff. The bill does not show upon what legal principle the non-suit was awarded. It is claimed, before this Court, that it was rightfully awarded, upon two grounds—

1. Because these parties were not proven to be partners.

2. Because, if partners, it was incompetent for Lee to bind the firm, by giving his own note, unless by express authority from his partner. No such authority being shown, it is argued that the Court was compelled to non-suit the plaintiff. Overruling, as we do, the judgment of the Court, I find it impossible to sustain

our judgment, without, at the same time, overruling the above propositions of counsel. Their discussion, briefly, therefore, becomes indispensable. And first, whether, according to law, by the proof, these parties are partners? Whether, *inter se*, they were partners, is not the question. It may be conceded, for the sake of the argument, that they were not. The inquiry is, whether, as to third persons, they were partners, and liable for the debts of the concern, as such? A *community* of property, and an *agreement* to share in the losses and profits of a business, or *community* of losses and profits, alone, will make the parties partners. But there may be a partnership without such community and agreement. There may be a partnership where there is no community of property—no agreement to share in the losses and profits, and no community of losses—that is to say, an agreement that one of the parties shall receive a proportion of the net profits of the concern, for money advanced for its use, or property furnished for its use, (as here,) will constitute a legal partnership, as to third persons. I do not mean to say, that in all cases, a person will be a responsible partner, who receives a part of the profits of a business. There are cases where such a person will not be. Thus, a party may, by agreement, receive by way of rent, a portion of the profits of a farm or tavern, without becoming a partner. *Prince vs. Hankinson*, 6 *Halst.* 181. 3 *Kent*, 34. So, to allow a clerk or agent a portion of the profits of sales, as a compensation for labor, or a factor a percentage on the amount of sales, does not make the agent or factor a partner, where it is intended merely as a mode of payment, and when not understood as an interest in the profits, *as profits*. 3 *Kent*, 34, and *note*. So, also, one who lends money to a firm, and is to receive therefor a fixed interest, or an annuity, certain as to amount and duration, will not thereby become a partner, as to third persons; because there is no mutuality of profit with the firm, and no general participation in its casual and indefinite profits. *Story on Partnership*, §66. *Collier on Part. b. 1, ch. 1, §1, p. 26, 2 edit.*

“The true distinction, (says Mr. *Story*,) by which we are to distinguish cases of this kind, from cases in which there is a partnership, as to third persons, is to ascertain whether the retiring partner, lender or annuitant is to receive a share of the profits, *as profits*; or whether the profits are relied on only as a fund of payment; or, in other words, whether the profit, or premium, or

annuity, is certain and defined, or is casual, indefinite and depending on the accidents of trade. In the former case, it is a loan—in the latter, a partnership." *Story on Part.* §67. *Grace vs. Smith*, 2 *W. Black. R.* 998, 1000. *Waugh vs. Cawrs*, 2 *H. Black. R.* 236 to 247. And again, "in short, in all cases of this kind, the real question to be solved is, whether the party is, in effect, to participate in the rise or fall of the profits, as such, or whether he only looks to the profits as a fund for payment of the annuity, but not exclusively to that fund. In the former case, he is a partner—in the latter, he is not." *Story on Part.* §69. "The test of partnership is a community of profit—a specific interest in the profits, *as profits*, in contradistinction to a stipulated portion of the profit, as a compensation." 3 *Kent*, 25. To which I add, in contradistinction, also, to a stipulated portion of the profits, as an annuity; that is, an annual sum for the use of money, or of negroes, or other property. It seems, then, clear, that if one is to receive a certain proportion of the profits, as one-third or one-half, *as profits*, he is a partner. If a *certain sum* is agreed to be paid out of profits, and the party does not look to that alone for payment, he is not a partner; but if the *sum to be paid* is not fixed, but may be increased or diminished by the amount or accidents of the business, then the receiver is a partner. *Story on Partnership*, §§68, 67, 69, 70. *Collyer on Part.* 28, 2 edit. 2 *W. Black.* 998. 2 *H. Black. R.* 235. *Loomis vs. Marshall*, 12 *Conn. R.* 69. *Champion vs. Bostwick*, 18 *Wend.* 175. *Vandenburg vs. Hull*, 20 *Id.* 70. 17 *Vesey*, 204. 1 *Rose. R.* 91. *Carey on Partnership*, 11, n. 1. 1 *Hill*, 526. 1 *Iredell*, 199. 38 *Eng. C. Law Reps.* 495.

Now, in this case, the proof is, that for the use of his negroes, Everitt was to receive, not a stipulated sum, but *one-half the net proceeds of the shop*. The amount he was to get, was to be paid out of the profits, *as profits*; and the amount depended upon the business—its amount, management and accidents. It would fluctuate according to the amount of the whole net profits—it was *one-half*, after expenses were paid. There was clearly community—mutuality, as to the profits; he looked to no other source for his hire; he was entitled to an account against Lee, for his interest in the concern. Upon the proof, as to the partnership, we are clear that the cause ought to have gone to the Jury.

[2.] There is no controversy about the general proposition, that

in both general and limited partnerships, each partner has authority to bind the firm, as to all things within the scope of the partnership, but not beyond it. When the firm is in the use of a name which imports a partnership, all contracts made in that name are, *prima facie*, obligatory upon all the members, unless they are *ultra* the business of the firm; and the onus, in such cases, lies upon the firm, if they would escape from their obligations, to prove that the credit was not given to the firm, or that the contracts are in fraud of its rights. It is also true, that when a contract is made by one member of a firm, as a note, in his own name, and it is apparent, on the face of it, that it is intended to bind the firm, it also is, *prima facie*, obligatory on it. But if a contract, as a note, is made by a member of a firm, in his individual name, and it is not apparent, on the face of it, that it is intended to bind the firm, then the presumptions are the other way—it is, *prima facie*, the note of the individual—the presumption is, that the credit was given to him, and the burthen lies upon the holder, to prove that it is the debt of the firm. Hence, it is true, that the note of one member of a firm does not, *prima facie*, bind the firm. These principles are subject to some modification, which will appear in the application of some of them to this case. A distinction is to be taken between the liability of a firm, on the note of one member, and its liability on the consideration of the note. Generally, on the note itself, without other evidence, the firm is not liable. There is a case, however, in which the firm will be liable on the note itself, and that is where the firm name is the name of one of its members. In such case, the note may be the note of the firm, or it may be the note of the individual. Upon the face of the paper it stands indifferent. The burthen of proof lies upon the plaintiff, in an action on the note. The case of *The United States Bank vs. Binney et al.* decided by Judge Story, on the circuit, is a leading case on this head, and is like this case in its material points. The action was brought there, to recover against the defendants, as partners of John Winship, upon an indorsement by John Winship. The defendants were proven to be partners of Winship in business. The management of the business was in the hands of John Winship—they had published no firm name. The plaintiff charged, that the defendants were partners, under the name of John Winship. Judge Story said, “The notes are all indorsed in the name of

John Winship. For aught, therefore, that appears on the face of them, they were notes only binding him personally. The plaintiffs, then, must go farther, and show, either expressly or by implication, that these notes were offered by Winship, as notes binding the firm, and not merely him personally, or that the discounts were made for the benefit, and in the course of the business of the firm. It is not sufficient to show that the bank, in discounting these notes, acted upon the belief that they bound the firm, and were for the benefit, and business of the firm. They must go farther, and prove that that belief was known to and sanctioned by Winship, himself, in offering the notes, and that he intentionally held out to them, that the discounts were for the credit, and on the account of the firm, and to bind them, and that the bank discounted the notes on the faith of such acts and representations of Winship." And he sent the case to the Jury, to find the facts, upon these instructions, as to the law. *5 Mason's R. 189*. In the case before me, the plaintiff goes against the defendants, both on the note and the consideration. Here, Everitt was in partnership with Lee, as we have seen. Lee managed the business, and the note was given by Lee. The parties promulgated no firm name. How much alike are the two cases! Now, let us see how far the proof brings the case under the rules laid down by Story.

The substance of the requirement made by Judge Story, of the plaintiffs, was, that they must prove that the notes were offered by Winship, as notes binding the firm; or that the discounts were made for the benefit and in the course of the business of the firm; that the plaintiffs must not only believe this, but that Winship did, by his acts and representations, sanction this belief, and that they discounted the notes on the faith of such acts and representations. Well, it is proven in this case, that it was known to the plaintiff, that Everitt and Lee were engaged together in the business of blacksmithing, and that ironing wagons was a part of their business. These things were represented to him by Lee, when he gave the note, and it was given for the wood work of wagons. Whether this testimony would fully make out the case, I do not determine; but that it does go, in part, to comply with the requisitions made by Judge Story, there is no doubt. The purchase was made, and the note given in the business, and on account of the firm. The plaintiff had a right to believe—to infer, at least—

that the transaction was a firm transaction, and the Jury might draw the inference, that the acts and representations of Lee sanctioned that belief; and there being *some evidence* to sustain the action on the note, as the note of the firm, the case ought to have gone to the Jury. See, also, a very interesting case growing out of the same partnership—*Etheridge vs. Binney*, 9 *Pick.* 274. *Story on Partnership*, p. 217, n. 1. 5 *Mason's R.* 177 to 189. *Miffin vs. Smith and another*, 17 *Serg. & Rawle*, 165.

If, however, this view of this case be unsatisfactory, there are other principles of the Law of Partnership which apply to it, and upon which it ought to be sustained.

[3.] I concede, that upon the face of this paper, we infer that no one is bound but Lee, the maker. The presumption which the law deduces from it is, that it is his personal affair, and that the plaintiff gave credit to him alone for the wagons. But this presumption may be rebutted, in an action for the price of these wagons, against the firm; and the rule unquestionably is, that notwithstanding the note of the individual partner was given—if the purchase was, in fact, made for the partnership business—if these wagons were applied to the uses of the firm, as stock, and became an element in the partnership resources—it is bound for the price. This is the rule, where money is borrowed by one on his own contract. The rule is the same where a purchase of property is made; and it is a reasonable rule, for if the firm gets the benefit of the money or property, *ex equo et bono*, it ought to be bound. “And (says Mr. *Story*, speaking on this head,) it must be resolved by taking into consideration the whole circumstances of the case. Thus, if the money is, in fact, borrowed for the partnership business, or if it is, in fact, applied to the partnership business, in the absence of all controlling circumstances, the partnership will be bound therefor, since the fair presumption is, that it was intended, by the partner, to pledge the partnership credit, and not merely his individual credit, whether the partnership was known or unknown to the lender.” *Story on Partnership*, §139. A distinction, however, obtains just here. If the money is lent on the credit of the individual member of a firm known to exist, although it be actually used and applied to the partnership purposes, yet the firm will not be bound—it will be considered as an advance by the individual, for the benefit of the firm, and he will become the creditor of the firm. So, that the

Buckner vs. Lee et al.

question to be resolved is this, to wit: to whom was the credit given? If I am right in my recollection of the plaintiff's declaration, it is so framed, as to admit proof of liability for the consideration of this note—it goes, also, upon that. I have not the record before me, and am not quite certain. There was some proof in this case, that the wagons were sold on the credit of the partnership; whether much or little, if any, the case ought to have been sent to the Jury. See *Story on Partnership*, §139. *Call-ger on Partnership*, pp. 276, 277, 278. 9 *Pick.* 272. 17 *S. & R.* 165. 5 *Mason*, 176. *S. C.* 5 *Peters' R.* 529. 5 *Watts*, 454. 8 *Metcalf*, 411, 420. 9 *Ib.* 454. 21 *Wend.* 365. 9 *Verm.* 252. 6 *Gov.* 497. 5 *Wend.* 223. 16 *Ib.* 505. 3 *Humph.* 209. 4 *Ib.* 346. 5 *Ib.* 499. 1 *Am. Lead. Cas.* 295, '6, '7, '8.

Let the judgment of the Court below be reversed.



C A S E S
ARJUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT CASSVILLE,
MARCH TERM, 1850.

No. 48.—JOHN MCGEE, plaintiff in error, *vs.* ABBY R. MCGEE,
defendant in error.

- [1.] On application for a writ of *ne exeat republica*, by a wife against her husband, pending a suit for a *partial* divorce and alimony, her affidavit is admissible—the wife, in this respect, being considered independent of her husband.
- [2.] If the threats of the husband, that he will leave the State, come to the knowledge of the wife, through the information of others, the affidavit of the third person should, if practicable, be filed with hers. If, however, she swears *absolutely* that he has threatened to remove, that is sufficient.
- [3.] A writ of *ne exeat* may be granted in this State, prior to any decree for alimony. The Court, in marking the writ, will exercise a sound discretion, under the special circumstances of the case—having due regard to the rank of the parties and the property of the husband, so as to prevent oppression or extortion.
- [4.] Where any person is arrested by virtue of a writ of *ne exeat*, he may be discharged, on giving bond, with good and sufficient security, either that he will not depart this State, or will pay the eventual condemnation money; or by showing that the writ ought not to have been granted.

In Equity, in Walker Superior Court. Decision on demurrer, by Judge WRIGHT, October Term, 1849.

Abby R. McGee filed her libel for a divorce, *a mensa et thoro*, against her husband, John McGee, and praying for alimony, as provided by the Statute.

Pending the suit for a divorce, Abby R. McGee filed her bill, alleging the pendency of the suit, her own necessitous condition, and that John McGee "had threatened and declared he would depart the realm, and remove his property beyond the limits of the State." The prayer was for a writ of *ne exeat republica*.

The bill was verified by the affidavit of Abby R. McGee, who swore that "the facts stated were true, so far as they concerned herself; and so far as they concern the acts and deeds of others, she believed them to be true."

To this bill a demurrer was filed, on several grounds; among others—

1st. That the affidavit of the wife was not a sufficient verification of the bill.

2d. The case made by the bill did not authorize the granting of the writ of *ne exeat*.

3d. The writ will not be granted, until there was a decree, allowing the alimony.

The Court below overruled the demurrer, and further held, that if the defendant filed his answer, denying the facts stated in the bill, the Court would, nevertheless, hold up the writ, until a trial of the libel for divorce.

To which decision, exceptions were filed by John McGee; and on these exceptions, error has been assigned.

W. AKIN, for plaintiff in error, in support of the points made, cited the following authorities :

7 *Vesey*, 171, 173, 410, 412. 2 *Story's Com.* 689, 692. 1 *Atkyns*, 521. 3 *Atkyns*, 521, '3, 503. 3 *Daniel's Ch. Pr.* 1931, and note 2, 1932, 1927. 6 *Ves.* 284. 14 *Ves.* 261. 2 *Mad. Ch.* 227.

C. PEEPLES, representing W. H. UNDERWOOD, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The first objection taken to the decision at the Circuit, is, that the evidence was incompetent, on which the order for the writ of *ne exeat republica* was granted—being founded on the affidavit only of the complainant, the wife of the defendant.

It is true, that the case of *Sedgwick vs. Watkins*, 1 *Fro. Jr.* 49,

sustains this objection; but Chancellor Kent, in *Denton vs. Denton*, 1 Johns. Ch. R. 441, says that this case is not founded on just principles; and, besides, he considered it as virtually overruled in *Shaftol vs. Shaftol*, 7 Ves. 171, where a similar application was made, on the oath of the wife, and no objection was taken, but the Chancellor proceeded at once to consider the merits of the motion. And it would seem, that if the wife is permitted to sue her husband, in her own name, as she has done, without objection, in this case, her affidavit as complainant is admissible, on the same ground as that of any other complainant; and it is the constant practice of the Courts, to grant this writ on the oath alone of the party.

[2.] It is contended that, admitting the evidence to be competent, it was not sufficient, in connection with the charges in the bill, to obtain the writ. The complainant alleges that she "entertains serious apprehensions that the defendant will depart the realm, and remove his property beyond the limits of the State—which he has threatened and declared he would do;" and her affidavit is in the usual form, namely, that the facts stated in the bill, so far as they concern herself, are true; and that, so far as they concern the acts and deeds of others, she believes them to be true.

We admit the law to be, that the complainant must not only shew that the demand will be endangered by the defendant's going abroad, but must charge, *positively*, that the defendant is going out of the State, or that he has said so. 6 Rand. R. 188. And this, we think, is substantially done. Had the complainant said, as it is assumed in the argument she did, that she had been informed by others of his threat, the affidavit of this third person should, if practicable, have been filed; but, from any thing which appears to the contrary, the threat may have been made to the complainant herself. At any rate, in the language of the authority, she does charge, *positively*, that she entertains just fears that he will remove, and that he has said so.

[3.] But the main point in this record is, that in cases of alimony, Courts of Equity will not grant the writ of *ne exeat*, unless there has been a decree, and then only for what is actually due; and further, that Courts of Equity, in Georgia, have no jurisdiction in the premises, in this State.

As this last proposition was not insisted on in the argument, I shall consider it as abandoned.

McGee vs. McGee.

The writ of *ne exeat regno* was a high prerogative right, originally applicable only to the purposes of State, but afterwards extended to private transactions. In England, *formerly*, it was confined to cases of equitable debt, and was equivalent to equitable bail; and the doctrine of Chancery was, that the debt for which the writ issues, must be due and certain, and must be such, that the sum to be marked upon the writ could be ascertained; and that, in cases of alimony, the Courts of Equity would not interfere, unless alimony has already been decreed, and then, only to the extent of what is due; and that, if there was an appeal from the decree pronouncing alimony, and, *a fortiori*, if no alimony has been decreed, and the case is a *lis pendens*, Courts of Equity will abstain from granting the writ. 2 *Story's Eq. Jur.* §1472, and authorities cited.

This rigid rule, however, has not been strictly adhered to in this country—even in those States where the Common Law, as in Georgia, has been adopted. Accordingly, we find Chancellor *Kent* declaring, in *Denton vs. Denton*, 1 *Johns. Ch. R.* 365, that “the allowance of a *ne exeat*, where the husband threatens to leave the State, and his wife without any support, is essential to justice, and has been allowed in such cases.”

In 1813, the Legislature of Georgia passed an Act, “to authorize the Judges of the Superior Courts to grant writs of *ne exeat*, in certain cases therein mentioned;” and the preamble recites, that “whereas, great evils have existed, and do yet exist, in this State, in consequence of the law of England, regulating writs of *ne exeat*, not having provided for cases where the demand set forth by the complainant is not due”—for remedy whereof, it is enacted, that “the Judges of the Superior Courts shall be, and they are thereby authorized, to grant writs of *ne exeat*, as well in cases where the debt or demand is not due, but exists fairly and *bona fide* in expectancy, at the time of making application, as in cases where the demand is due.” It further provides, that “in case of joint and several obligors, if any one or more of them are about to remove without the jurisdictional limits of this State, and are carrying off their property, leaving one or more fellow-obligors, bound with them for the payment of any debt, penalty, or for the delivery of property at a certain time, which time has not arrived, such obligor or obligors, who remain, shall have the benefit of the writ of *ne exeat*,” &c. All securities, likewise, are al-

lowed the advantage of this remedy. *Prince*, 440, 441. It is obvious that this Act has overturned and superseded the whole doctrine of the English Law upon this subject, and made the writ of *ne exeat* applicable to all sorts of liabilities—due or undue—certain or otherwise—if they, *bona fide*, exist in expectancy at the time the writ is applied for.

Now, it will be borne in mind, that our Statute requires that in cases where partial or conditional divorces are granted, the Jury shall inquire into the situation of the parties before their intermarriage, and also at the time of the trial; and they *shall*, by their verdict or decree, make provision out of the property of which the husband may be possessed, for the separate maintenance and support of the wife and children, if there be any; which verdict or decree shall be carried into effect, &c. *Prince*, 467. The bill charges that the defendant has property in possession, of the value of \$4,000, and that there are no children; and the complainant not only makes a case in her bill, which shows that she is entitled to suitable provision for her maintenance, but her affidavit states expressly, that she considers herself entitled to adequate support out of her husband's property. Here, then, in contemplation of the Statute of 1813, is "a *bona fide* demand, existing in expectancy," and comes both within the spirit and letter of the Act. We feel the less hesitancy in coming to this conclusion, not only because it is essential to the ends of justice, but it is warranted by the universal practice which has obtained throughout the State, under this Act.

[4.] Complaint is made in the bill of exceptions, that the Court decided, in advance, that if the defendant should file his answer, denying the charges in the bill, the *ne exeat* should still be continued, till the hearing of the libel for divorce; and that the only mode by which the defendant could relieve himself from the writ, was by giving bail, as at Common Law, or bond and security for the eventual condemnation money.

The Act of 1830 declares, that "in all cases where persons may thereafter be arrested by virtue of writs of *ne exeat*, they shall be discharged, on their giving bond, with good and sufficient security, either that they will not depart this State, or for the payment of the eventual condemnation money." *Prince*, 468.

It is somewhat inaccurate, therefore, to prescribe bail to be given, as at *Common Law*, where the condition of the recogni-

zance is, that in case the defendant is cast in the suit, he (the defendant) will satisfy the condemnation, or render his body into prison in execution for the same, or he (the bail) will do it for him: whereas, as we have seen, under the Act of 1830, the only condition of the bond is, that the defendant will not depart the State, or satisfy the ultimate recovery.

But we apprehend that it is still competent for the defendant to show, as he might do before, that the writ of *ne exeat* ought not to have been granted. 2 *Tuck. Com.* 486. Otherwise, writs of *ne exeat* would often operate very harshly. We do not say that we should undertake to control the discretion of the Circuit Judge, should he hold, as he said he would, that he should retain the writ till the hearing of the divorce, notwithstanding the defendant should, by his answer, deny all the charges in the bill; still, as a matter of legal right, we should be loth to sanction the principle, that the door of justice was barred in this case, against the privilege of being heard.

Not viewing any of the obstacles, then, to this proceeding, as insurmountable, and taking it for granted, that while Courts will maintain this writ, for the purpose of securing to the wife and offspring provision, in accordance with the rank of the parties and the fortune of the husband, that they will take care, at the same time, that it is not used for oppression and extortion;

We affirm the judgment of the Superior Court.

No. 49.—SAMUEL MCWHORTER, adm'r of John M. Thompson, deceased, plaintiff in error, vs. JOHN F. BEAVERS, defendant.

[1.] Where property of a defendant in execution is seized and sold by the Sheriff, and there is no warranty of title, on the part of the defendant in execution, or the Sheriff, the maxim of *caveat emptor* applies to the purchaser of property at Sheriff's sale; and the purchaser at Sheriff's sale cannot maintain an action against the defendant in execution, for so much money paid to his use, on failure of such title to the property so purchased.*

*See *Worthy et al. vs. Johnson et al. ante*, page 226.—[Rep.]

Assumpsit, &c. in Chattooga Superior Court. Tried before Judge WRIGHT, October Term, 1849.

This cause was submitted, in the Court below, upon the following agreed statement of facts—

"A *fi. fa.* in favor of James Bryson & Co. vs. Samuel McWhorter, administrator of John M. Thompson, and others, was levied on a negro woman and child, as the property of Thompson, and sold at Sheriff's sale, under this levy. John F. Beavers became the purchaser, at the sum of \$450; which sum of money was applied to the payment of the *fi. fa.* Samuel McWhorter was present when the negroes were sold. Afterwards, Beavers was sued for the negroes, by Robert Caldwell and his wife, who was the daughter of John M. Thompson. Caldwell and wife recovered the negroes, and McWhorter was a witness on the trial of the cause."

The present action was by Beavers against McWhorter, as administrator, to recover the purchase money, as so much paid to the use of the estate.

Counsel for defendant insisted, before the Court below, that the plaintiff could not recover, because there was no warranty, either express or implied, at Sheriff's sale; that the doctrine of *caveat emptor* applied to all judicial sales; and if the purchaser at Sheriff's sale sustained any loss, there was no one to whom recourse could be had for indemnity.

The Court overruled these positions, and this decision is alleged as error.

W. AKIN, for plaintiff in error.

HOOPER and ALEXANDER, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] The only question presented by the record in this case is, whether, in a judicial sale, made by a Sheriff, of the property of a defendant in execution, there is any warranty of title to the property so sold, to the purchaser thereof? The property of a defendant in execution is seized by the Sheriff, by virtue of judicial process, against his will, and sold under the authority of the law.

Bond and Pruitt vs. Connelly.

There is no warranty of title to the purchaser, *implied*, on the part of the defendant in execution, or by the Sheriff. The maxim of *caveat emptor* applies to the purchaser of property at such sales. *The Monte Allegre Tenant claimant*, 9 *Wheaton's Reports*, 616. *Yates vs. Bond*, 2 *McCord's Reps.* 382, *Murphy vs. Higginbottom*, 2 *Hill's S. C. Rep.* 397.

From the facts in this case, the plaintiff below cannot maintain his action on the ground of mistake. *Davis vs. Hunt*, 2 *Bailey's Rep.* 418. Neither can the plaintiff recover, for so much money paid to the use of the defendant in execution, for the reason that the property was seized and sold, against *his will*, and there exists no *privity* in law, between the defendant in execution, and the purchaser at Sheriff's sale, inasmuch as there was no warranty of title, either express or implied.

Let the judgment of the Court below be reversed.

No. 50.—GEORGE T. BOND and JOHN W. PRUITT, executors, &c. plaintiffs in error, vs. DEMPSEY CONNELLY, defendant in error.

[1.] To a bill filed by executors, for direction in the execution of the trusts of a will, and, also, asking to be protected against a contingent claim against the estate, which it is alleged may result from an outstanding title in remainder, set up by a third person, to certain property of the estate, and which title is derived from others than the testator, and is independent of the will, such third person is not a necessary party, and the bill will be dismissed, as to him, upon demurrer.

In Equity, in Franklin Superior Court. Decision on demurrer, by Judge DOUGHERTY, October Term, 1849.

George T. Bond and John W. Pruitt, executors of Samuel Pruitt, filed their bill, in Franklin Superior Court, alleging the following facts :

In December, 1814, Samuel Pruitt intermarried with one Ke-

ziah Connelly, a widow, who had, by a former marriage, three children—Dempsey Connelly, Lavina Connelly, who subsequently intermarried with William Neal; and Sarah Connelly, who intermarried with Robert Burton. At the time of the intermarriage of Pruitt, Mrs. Connelly was possessed of a considerable number of negroes, and other property. About one month prior to the marriage, and in contemplation of it, and in fraud of the marital rights of the husband, Mrs. Connelly, by deed, conveyed all of her slaves to her three children, after her decease. After the marriage, difficulty having arisen, Dempsey Connelly and Robert Burton relinquished to Mrs. Pruitt and the heirs of her body, a portion of the property conveyed by the former deed; which deed they have, since that time, claimed to be void. Some short time thereafter, William Neal and wife relinquished all their interest, under the deed, to John W. Pruitt, one of the executors, who was the youngest and only child of Mrs. Pruitt, by her last husband.

In January, 1839, Samuel Pruitt made a deed of gift, conveying all the negroes received by his wife, to his son, and her only child by him, John W. Pruitt, and warranted the title to the property. In December, 1845, Samuel Pruitt died testate, bequeathing his property to his widow and children. The property conveyed by deed of gift to John W. Pruitt, was bequeathed to him. On the 14th September, 1847, Dempsey Connelly gave John W. Pruitt notice, that he should claim his portion of the negroes, conveyed in the deed of his mother, at her death.

The bill farther alleged, that John W. Pruitt holds the estate of Samuel Pruitt responsible, on the warranty in the deed of gift from Samuel Pruitt to John W.

The bill farther alleged, that the legatees under the will of Samuel Pruitt, except the widow and John W. Pruitt, had filed their bill against the complainants, as executors of Samuel Pruitt, to recover their legacies—having refused to give the executors bonds to indemnify them for any recovery which might be had upon the warranty in the deed of gift to John W. Pruitt.

The bill made, as parties defendant, the legatees, who were complainants in the former bill—Keziah Pruitt, Dempsey Connelly, of Campbell County, and Robert Burton—and prayed that they might answer, and set forth their various claims and titles; that they be required to interplead and settle their conflicting

rights; that the claims of Dempsey Connelly and Robert Burton be litigated and definitely settled; and if allowed, that John W. Pruitt be permitted to retain a sufficient sum, out of the estate of Samuel Pruitt, to indemnify him on the warranty in his deed of gift; and if there should not be more than enough of the estate to pay him, that the other legatees be perpetually enjoined from collecting the same.

To this bill a demurrer was filed by Dempsey Connelly, on the ground that he was not a necessary and proper party to the bill, and there was no equity in the bill, as against him.

The Court sustained the demurrer, and the complainants, George T. Bond and John W. Pruitt, filed exceptions to this decision.

C. PEPPLES and HILLYER, for plaintiffs in error.

W. H. HOLL, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] There is only one question in this record for our consideration—for but one decision was made by the Court below. We were invited, by counsel for the plaintiff in error, to the consideration of a number, which invitation we declined. The sole question is, whether Dempsey Connelly ought to have been retained as a party to the bill filed by the executors, to Samuel Pruitt's will. We think that the presiding Judge did right in dismissing it, as to him. The bill was filed by the executors, for the purpose of getting protection against a contingent claim upon the estate, before proceeding to a distribution. They had refused to pay out the legacies, unless refunding bonds were given, upon the ground that one of them, to wit: John W. Pruitt, was the donee of a number of negroes, under a deed, with warranty of title from the testator, and that Dempsey Connelly claimed title to those negroes, as remainder-man, after a life estate in his mother, by deed of gift, executed by his mother before her intermarriage with the testator. The reasoning is this: Dempsey Connelly setting up a title in remainder, paramount to the title of John W. Pruitt; if that title is established, the covenant of warranty in the deed from the testator to John W. Pruitt will be bro-

ken, and he will be entitled to go upon the estate for damages; therefore, they, the executors, ask the Chancellor to decree, that they may be allowed to retain effects sufficient to respond to that claim of damages. To get this decree, they have filed their bill, in the nature of a bill of interpleader, against all the legatees, and, also, against Dempsey Connelly, and pray that he, Connelly, shall litigate his title, and that the Court adjudicate it. The question is, can they compel him now to litigate his title? Is he a necessary party to the bill, with a view to the relief sought by the complainants? If they are entitled to relief—if they are entitled to retain property sufficient to respond to the breach of the warranty—I see no reason why that relief may not be decreed, without bringing Connelly before the Court and deciding upon his title. A Court of Chancery might decree the relief, without a final adjudication of his title. It would have the whole case before it, and would, doubtless, frame a decree so as to do justice to the legatees, protect the executors, and still leave Connelly unprejudiced as to his title. All these things we leave to the Court below, upon the hearing. All that we now say is, that we do not see that, if the complainants are entitled to the relief they ask, at all, Connelly is a necessary party, in order to the granting of that relief.

Again: this is a bill filed for the aid and direction of Chancery, by the executors, in execution of the will. Connelly, who is a stranger to the will—who claims nothing under it—but who is alleged to hold title to property of the estate of the testator, paramount to the title of the testator, and derived from a third person, is made a party defendant, and required to litigate that title. Upon authority and principle, this cannot be done. "No person (says Mr. Story) need be made a party to a bill, who claims under a title paramount to that brought forward and to be enforced in the suit, or who claims under a prior title or incumbrance not affected by the interests or relief sought by the bill. Thus, for example, on a bill to carry into effect the trusts of a will, a person who claims by a title paramount to that will, ought not to be made a party, in order to bring into contestation his rights under such paramount title." *Story's Eq. Plead.* §230. It seems to me, that this is the very case put by Mr. Story, in illustration of the rule. See, also, *Devonshire vs. Newenham*, 2 Sch. & Lefr. 207, 212. *Pelham vs. Gregory*, 1 Eden. R. 520. S: C. 6 Bro. Ch.

Flournoy vs. Newton.

R. 575. 3 Bro. Par. Cas. by Tomlins, 204. Eagle Fire Ins. Co. vs. Lent, 6 Paige's R. 635. Lange vs. Jones, 5 Leigh's Rep. 192. Story's Eq. Plead. §§148, 149. 1 Daniels' Ch. Prac. 313.
 Let the judgment be affirmed.

No. 51.—HOWELL C. FLOURNOY, plaintiff in error, vs. JOHN H. NEWTON, defendant.

- [1.] Under the Bankrupt Act of 1841, where a discharge is sought to be attacked for fraud, a prior reasonable notice is required to be given, specifying the grounds of fraud; and the notice may be amended, at any time before the final trial, provided a sufficient time elapse to enable the bankrupt to prepare to rebut it.
- [2.] The transfer of his effects, by a bankrupt, in contemplation of bankruptcy, is a fraud upon the law.
- [3.] A bankrupt may appropriate so much of his effects as may be necessary to raise the means to maintain his application in bankruptcy.
- [4.] Parol evidence is inadmissible to prove the contents of an execution and transfer, in writing, where both facts are material to the issue.
- [5.] Where there is conflicting evidence, a mere preponderance against the verdict of the Jury is not sufficient to authorize a new trial.

Assumpsit, &c. in Clarke Superior Court. Tried before Judge JAMES JACKSON, February Term, 1850.

This was an action by John H. Newton, against Howell C. Flournoy, as indorser on a promissory note made by Charles G. McKinley, dated Jan. 30, 1840. To this, the defendant pleaded a discharge in bankruptcy, dated Dec. 1st, 1843. On the trial, the plaintiff proposed to read to the Jury three several notices to defendant, of his intention to impeach the discharge—one dated 29th July, 1845—one dated Jan. 7th, 1847—and the last dated Jan. 27th, 1848. Defendant's counsel objected to the two last notices, on the ground that no leave of the Court had been obtained to amend the notice first served—which objection was overruled by the Court; and defendant excepted.

The second notice stated the following grounds :

" 1st. That in contemplation of bankruptcy, you transferred and sold to one George Mews, a judgment obtained by you against one John S. Smith, in Clarke Superior Court, for \$55 principal, and \$6 50 interest, upon which a *fi. fa.* was issued 23d August, 1838, for some sum equal to, or less than, said *fi. fa.*—to the great detriment and injury of your creditors, who are entitled to a full, fair and accurate inventory of your property, rights, credits, &c.

" 2d. Because, pending your application in bankruptcy, or since said discharge; you sold and transferred the above-named judgment to George Mews—the same not being enumerated in the inventory of your property, required by the Bankrupt Law."

Defendant's counsel objected to any evidence being given under this notice, on the ground that there was no allegation of a fraudulent intent, or any fraudulent act, in relation thereto, specified in the notice. The Court overruled the objection, and defendant excepted.

The plaintiff offered the testimony of George Mews and Everett Yerby, examined by commission, to prove the transfer of the *fi. fa.* in favor of Flournoy against Smith, from Flournoy to Mews, and from Mews to Yerby. Defendant's counsel objected to the evidence, on the ground that they disclosed the fact that the *fi. fa.* of which they testified, was transferred in writing, and parol testimony of the contents of the *fi. fa.* and the transfer are inadmissible. The Court admitted the testimony, and defendant excepted.

The testimony submitted to the Jury on the question of fraud, was, in substance, as follows :

The answers of John H. Newton, the defendant, admitted that he had heard of the application of Flournoy for a discharge in bankruptcy; that Flournoy did offer to sell him a *fi. fa.* on James D. Frierson, (the transfer of which was alleged in one of the notices as a fraud,) for something under \$100, which *fi. fa.* he (Flournoy) afterwards sold to Mr. Hancock.

Thos. Hancock stated that he did purchase a *fi. fa.* on Frierson for \$460, from Flournoy, for \$60. Flournoy said his object in selling the *fi. fa.* was to raise money to enable him to proceed

Flournoy vs. Newton.

in bankruptcy; that he was obliged to have it that day, else it would be too late; that he had offered it to Newton at the same price. Witness considered it worth the amount he paid. Frierson was insolvent at the time, and is so still. He has never collected anything on it. Frierson was related to witness—otherwise, he would never have bought it.

Geo. Mews received a *fi. fa.* Flournoy vs. Smith, from Eliza Parrish, to collect on shares. There was a transfer on it from Flournoy to him—the date not recollected. A levy was made, but he did not know what had become of it. He did not know that Smith was insolvent. Flournoy stated to him that he sold the *fi. fa.* to Mrs. Parrish for \$5, to enable him to take the benefit of the Bankrupt Law.

Everett Yerby gave \$15 for the *fi. fa.* on Smith—the most of it in a debt on Mews. There was a transfer on it—date not recollected. There was a levy and claim—cannot say that Smith was insolvent. If anything collected, he does not know it.

John Yarborough—Defendant told witness that he sold the *fi. fa.* against Smith, for \$5; that he did so to keep Newton from catching at him. The conversation was about the application for bankruptcy. Defendant said he gave Mrs. Parrish the money to buy the *fi. fa.* She was his woman; has since become his wife. Witness did not think defendant intended to defraud Newton; Smith was insolvent, but a hard-working mechanic.

Asbury Hull considered Smith entirely insolvent, in 1842 and 1843. Frierson is generally considered insolvent.

The Jury found a verdict for the plaintiff. Defendant moved for a new trial, principally on the ground that the verdict was contrary to the evidence, and the weight of evidence.

The Court refused the motion, but admitted that the verdict was contrary to the weight of evidence; yet, as the case turned on the question of fraud, while he would not have found the verdict, if upon the Jury, he did not feel at liberty to disturb it.

To which decision, defendant excepted.

And on these several exceptions, error has been assigned.

HILLYER and HULL, for plaintiff in error.

C. PREPLES and W. AKIN, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

John H. Newton sued Howell C. Flournoy, as the indorser of a promissory note, made by Charles G. McKinley. The defendant pleaded a discharge in bankruptcy. The plaintiff impeached the discharge for fraud. The Bankrupt Act of 1841, requires the creditor to give reasonable notice, specifying the grounds of fraud. In this case, three notices were filed—the two last of which were objected to, for the reason that no leave of the Court was previously obtained.

[1.] Was it necessary to get leave? Counsel for the plaintiff in error insist, that the notice is a part of the pleadings; that it is in the nature of a replication, and cannot be amended without the permission of the Court. Were this so, the amendment, we apprehend, would be fully authorized by the rules of practice; but we do not consider the notice a part of the pleadings. The Act of Congress requires, that "reasonable notice" be given, specifying the grounds of fraud." And the question is, has this been done? The last of the three notices was served in January, 1848, and the final trial of the cause was not had till February, 1850, more than two years thereafter. That time was ample to prepare to rebut the attack. Besides, had the defendant been surprised, he could have moved for a continuance. Failing to do this, we are warranted in presuming that he suffered no injury.

[2.] The second notice was to the effect, that the certificate of bankruptcy would be impeached, because the debtor, in contemplation of bankruptcy, had sold and transferred to one George Mews, a judgment obtained by him against one John S. Smith, in Clarke Superior Court, for the sum of fifty-five dollars, principal, and five dollars and fifty cents, interest, for an amount equal to or less than said judgment, to the great detriment of the plaintiff; and the objection to this notice is, that it contains no allegation, either of any fraudulent act or intention.

All fraud vitiates the discharge, and the second section of the Act declares, expressly, that "transfers of property, in contemplation of bankruptcy," are "utterly void, and a fraud upon the Act," and the same may be set up as an impeachment of the discharge. The specification in the notice is in terms of the law.

[3.] We have been called on to say, whether a bankrupt may

not appropriate a portion of his effects, by sale or otherwise, to raise the means to obtain his discharge? We think that he may; otherwise, the benefit secured to him by the Act would be unavailing. The question should be submitted to the Jury, under the charge of the Court, whether the assignments in this case were *bona fide* made, to raise the necessary funds to maintain the application, or whether it was done, colorably only, and for the purpose of defeating the creditors.

[4.] The next complaint in order is, that the Court below erred in permitting the plaintiff to introduce parol testimony of the transfer of the Smith *fi. fa.* to Mews—it appearing, in evidence, that said transfer was in writing; and upon this point we are compelled to sustain the plaintiff in error. The charge on the notice is, that this conveyance was made in contemplation of bankruptcy—consequently the date of the transaction is material. It is also alleged, that the execution was assigned for a sum equal to or less than the amount of the judgment. The *amount*, therefore, of the *fi. fa.* is essential; and we know of no principle which will justify us in dispensing with the highest evidence, namely: the execution itself, together with the written transfer. We suppose the doctrine to be too well established to admit of doubt, that whenever it turns out, either in the direct or cross-examination, that a writing exists, with regard to a transaction, which the law esteems as the best evidence, it must be produced, or its absence accounted for; and that if this is not done, all inferior or secondary evidence that may have been given, will be stricken out and disregarded. *Rex vs. Radston*, 4 *Barn. & Adolp.* 208. *Rex vs. Rondor*, 8 *Barn. & Cress*, 708. *Boon vs. Dykes*, 3 *Monroe's Rep.* 529, 531.

But it is ingeniously argued, that the transactions in controversy here, are proven by testimony entirely independent of the writings themselves, to wit: the declarations of the party; and the case of *Sewell vs. Stubbs*, (1 *Carr. & Payne*, 73,) would seem to sustain this position. The better opinion, however, is, that you cannot ask the witness what the opposite party has said, as to the contents of papers executed by him, without accounting for their non-production. *Bloxam vs. Elsee*, 1 *Carr. & Payne*, 558. *Van Dusen vs. Fink*, 15 *Pick.* 449. *Ex parte Simpson*; *Charl. R.* 111. *Hart vs. Yant*, 1 *Watts*, 252. *Wiggin's administrators vs. Pryor's administrators*, 3 *Porter*, 430. *Freeman vs. Pray*, 2 *Bail.*

394. *Northorp vs. Jackson*, 13 *Wend.* 86. *Ramsay vs. Johnson*, 8 *Penn.* 293.

It is well known that we, as a Court, are not latitudinarian, but strict constructionists, as to the great rule of evidence—that where a writing exists, it constitutes the best, if not the exclusive medium of proving the facts to which it relates, and that we have rarely, if ever, yielded to the authority of those *dicta*, or even reported cases in this country, which would allow matter evinced by written evidence, to be proved orally. Our experience is, that the general results of every relaxation of the rule, have soon demonstrated its impropriety. In this very case, if the writing had been produced, it might have turned out, either that the assignment was made after the certificate of discharge was obtained or prior to the passage of the law, and thus have precluded the idea, that it was done in contemplation of bankruptcy.

[5.] The only remaining ground in the record is, that the Court erred in refusing to grant a new trial, because the verdict was contrary to evidence.

We know not that we have any thing to add to the grounds heretofore taken, and so uniformly and firmly maintained by this Court, especially since the decision in *Mays vs. Stroud*, 7 *Ga. Rep.* 269. I would merely remark, that in *Goodman vs. Smith*, (4 *Dev. Law Rep.* 450,) the Supreme Court of North Carolina held, that they would not set aside the verdict, although, in their opinion, founded on *slight* testimony; and Judge *Gaston*, in delivering the opinion, says, “Upon the whole, we do not feel ourselves authorized to say, that there was *no* evidence to be left to the Jury, respecting the fact upon which they found their verdict.”

We consider the recent Act of the General Assembly, forbidding the presiding Judge, to *intimate* even his opinion as to the facts, and making it a distinct ground of error, as a legislative sanction and indorsement of our efforts to protect the just rights of this co-ordinate branch of the judiciary.

Are we constrained, from an examination of the testimony, to conclude that there was corruption in the Jury box, or that they acted from prejudice against the defendant? John Yarborough testifies, that Flournoy told him; that he sold the execution against Smith to Eliza Parrish, who was, at that time, his *woman*, for five dollars; that he gave her the money to buy it with, and that he

did this "to prevent Newton (the plaintiff) from catching at him." The proof, then, is, that he conveyed away *all* the property he had, except his trunk and wearing apparel, in contemplation of bankruptcy, which is, of itself, a fraud upon the law, and that he averred to the witness, that his object was to prevent his creditor from "catching at him." We should not call this *slight testimony*.

Since the argument of this case, my attention has been called to that section of the Judiciary Act of 1799, which declares, that if the verdict of the Special Jury be given *contrary to evidence* and the principles of justice and equity, it shall and may be lawful for the presiding Judge to grant a *new trial*. *Prince*, 432. We do not suppose, however, that this provision was intended to enlarge the powers of the Court, or to change the great principles of the Common Law, as to the relative rights and province of the two departments of the judiciary. Such has not been the construction put upon it by the Superior Courts of this State. If a new trial is to be granted merely because, in the opinion of the Court, the weight of evidence is on the other side, trial by Jury is virtually annihilated, and the Court will be substituted for the Jury, in every case, in trying the credibility of testimony and the preponderance of the proof.

Indeed, this idea is expressly negatived by the preceding section, which requires the power to grant new trials, to be exercised "*according to law*." *Prince*, 432. That is, according to the usages and customs of the English Courts of Common Law.

By the Act of 1823, (*Prince*, 455,) regulating appeals from the Court of Ordinary, it is declared to be the policy of this Government, to retain the trial by Jury, *in all cases in which matters of fact are involved*. For the Court, therefore, to undertake to control the Jury, in matters of fact, is obviously to contravene this policy.

I am aware that doubts are entertained by many, at this day, as to this policy. A late popular writer in this country has assailed trial by Jury, with great vehemence, and the conclusion at which he comes is, that the institution itself, so admirable in monarchy, is totally unsuited to a democracy; that the very principle that renders it so safe, where there is a great central power to resist, renders it unsafe in a state of society in which few have sufficient resolution to attempt even to resist popular impulses.

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Georgia R. R. & B.

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questions of fraud, the Jury are much more
acquaintance with the parties, the witnesses, and the every-day
neighborhood transactions of life, to administer full and complete
justice, than the Courts. At any rate, it must be a most glaring
case which would induce us to disturb their finding in questions
of this character.

The judgment of the Court is, therefore, affirmed upon the
first, second and fourth grounds in the bill of exceptions, and re-
versed upon the third.

Judgment reversed.

No. 52.—THE GEORGIA RAIL ROAD & BANKING COMPANY, plain-
tiffs in error, vs. JOHN D. MILNOR & Co. defendants.

- [1.] The pleadings in Equity causes, pending on the appeal, are not amenda-
ble, as a matter of course, but only by leave of the Court, on *special cause*
shown.
- [2.] Where, upon special cause shown, the Court below, in the exercise of its
discretion, allows an amendment to be made to the complainant's bill, this
Court reluctantly interferes to control that discretion.

In Equity, in Clarke Superior Court. Decision on amend-
ment, by Judge JAMES JACKSON, February Term, 1850.

At August Term, 1842, of Clarke Superior Court, John D. Mil-
nor & Co. filed a bill against The Georgia Rail Road & Banking
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Company, alleging that on 21st December, 1846, complainants entered into an agreement with The Georgia Rail Road & Banking Company to construct the superstructure on six divisions of the Athens branch of their road. By this agreement, it was stipulated that the materials were to be furnished by the Rail Road Company at convenient places on the road. It was further agreed, that if the work, or any part thereof, in the opinion of the engineer, be constructed in an inferior manner, that then and in that case, the engineer might make such a deduction from the price stipulated in the agreement, as he might deem fair and right. The bill charged, that from the fault of the company, the complainants were subjected to most ruinous delays; that by the agreement, all matters in controversy were to be submitted to the engineer, and that he had refused to allow them anything for lost time.

The bill further charged, that complainants "had already submitted—not without complaint, to be sure—to heavy deductions, under various pretexts; that the engineer had scaled the estimates one thousand dollars, and asked the question, "was not this enough to lose, in all fairness?" that "it was submitted to, because some of the complainants were pressed with pecuniary responsibilities, which had to be met at any sacrifice, and which admitted of no delay, and that this fact was but too well known to those who had the power over them."

The prayer of the bill was, that the award of the engineer might be set aside, respecting the compensation to be allowed them for the lost time, and that the company might come to a full and fair account for the lost time, and for further relief.

By an amendment made at the Return Term, it was charged, that the complainants did not know, at the time the contract was made, that the engineer was a stockholder, to the amount of \$10,000, in said company.

There was a verdict for complainants, and an appeal. Prior to the first term of the appeal, viz: 1st January, 1849, the complainants filed an amendment, charging, "that the scaling of their account, by the engineer, was unjust and without foundation—the work being done by them according to contract; that they were ready to prove that the work done by them was as good, if not the best, that there was along the line of the road from Augusta to Athens; yet that the said interested engineer, from bias and

prejudice, and without any proper reason therefor, deducted from their estimates, under the contract, the sum of \$1,100, which sum they charged to be still due and owing them, under said contract." The amendment prayed an answer and a decree, compelling the defendants to pay to complainants the sum, so unjustly withheld, with interest thereon.

Service of this amendment was acknowledged by defendants' counsel, and counsel for complainants notified by him, that "if the amendment is insisted on, the case will not be for trial in February." At August Term, 1849, the case was continued by defendants. At February Term, 1850, the cause being called, both parties announced themselves ready, and were proceeding to strike a Jury, when counsel for complainants moved to take the amendment, *pro confesso*, which motion was refused, on the ground that the amendment had never been allowed by the Court.

Complainants' counsel then moved that the amendment be allowed *instanter*, which motion was resisted, on the grounds—

1st. That the amendment never could have been made.

2d. That if allowable at all, it was now too late.

3d. That the amendment could not be made, unless sworn to, and some good cause shown for the amendment being delayed so long; and if allowed by the Court, it should be on terms.

The Court allowed the amendment, and held, that the amendment did not seek to engraft a new substantive contract upon the bill, but grew out of, and was part and parcel of the contract charged therein; that the scaling of the estimates, though not distinctly and clearly charged, was yet complained of in the bill, and that the amendment was such an one as a Court of Equity would allow in furtherance of justice, and of its settled policy not to do justice by halves.

In regard to the second objection, the Court held, that as the amendment now sought to be made, had been filed and served under the former Equity practice of the Circuit, and the decision of the Supreme Court, altering that practice, having been recently made, the Solicitor for complainants was not in *laches*, and justice would be best promoted by allowing the amendment.

In regard to the last objection, one of the complainants being in Court, offering to swear to it, the Court held it unnecessary—the amendment being simple and the original bill not sworn to.

This decision of the Court is assigned for error.

did this company, alleging that on 21st December, 1846, complainants entered into an agreement with The Georgia Rail Road & Banking Company to construct the superstructure on six divisions of the Athens branch of their road. By this agreement, it was stipulated that the materials were to be furnished by the Rail Road Company at convenient places on the road. It was further agreed, that if the work, or any part thereof, in the opinion of the engineer, be constructed in an inferior manner, that then and in that case, the engineer might make such a deduction from the price stipulated in the agreement, as he might deem fair and right. The bill charged, that from the fault of the company, the complainants were subjected to most ruinous delays; that by the agreement, all matters in controversy were to be submitted to the engineer, and that he had refused to allow them anything for lost time.

The bill further charged, that complainants "had already submitted—not without complaint, to be sure—to heavy deductions, under various pretexts; that the engineer had scaled the estimates one thousand dollars, and asked the question, "was not this enough to lose, in all fairness?" that "it was submitted to, because some of the complainants were pressed with pecuniary responsibilities, which had to be met at any sacrifice, and which admitted of no delay, and that this fact was but too well known to those who had the power over them."

The prayer of the bill was, that the award of the engineer might be set aside, respecting the compensation to be allowed them for the lost time, and that the company might come to a full and fair account for the lost time, and for further relief.

By an amendment made at the Return Term, it was charged, that the complainants did not know, at the time the contract was made, that the engineer was a stockholder, to the amount of \$10,000, in said company.

There was a verdict for complainants, and an appeal. Prior to the first term of the appeal, viz: 1st January, 1849, the complainants filed an amendment, charging, "that the scaling of their account, by the engineer, was unjust and without foundation—the work being done by them according to contract; that they were ready to prove that the work done by them was as good, if not the best, that there was along the line of the road from Augusta to Athens; yet that the said interested engineer, from bias and

prejudice, and without any proper reason therefor, deducted from their estimates, under the contract, the sum of \$1,100, which sum they charged to be still due and owing them, under said contract." The amendment prayed an answer and a decree, compelling the defendants to pay to complainants the sum, so unjustly withheld, with interest thereon.

Service of this amendment was acknowledged by defendants' counsel, and counsel for complainants notified by him, that "if the amendment is insisted on, the case will not be for trial in February." At August Term, 1849, the case was continued by defendants. At February Term, 1850, the cause being called, both parties announced themselves ready, and were proceeding to strike a Jury, when counsel for complainants moved to take the amendment, *pro confesso*, which motion was refused, on the ground that the amendment had never been allowed by the Court.

Complainants' counsel then moved that the amendment be allowed *instantly*, which motion was resisted, on the grounds—

1st. That the amendment never could have been made.

2d. That if allowable at all, it was now too late.

3d. That the amendment could not be made, unless sworn to, and some good cause shown for the amendment being delayed so long; and if allowed by the Court, it should be on terms.

The Court allowed the amendment, and held, that the amendment did not seek to engraft a new substantive contract upon the bill, but grew out of, and was part and parcel of the contract charged therein; that the scaling of the estimates, though not distinctly and clearly charged, was yet complained of in the bill, and that the amendment was such an one as a Court of Equity would allow in furtherance of justice, and of its settled policy not to do justice by halves.

In regard to the second objection, the Court held, that as the amendment now sought to be made, had been filed and served under the former Equity practice of the Circuit, and the decision of the Supreme Court, altering that practice, having been recently made, the Solicitor for complainants was not in *laches*, and justice would be best promoted by allowing the amendment.

In regard to the last objection, one of the complainants being in Court, offering to swear to it, the Court held it unnecessary—the amendment being simple and the original bill not sworn to.

This decision of the Court is assigned for error.

Judge LUMPKIN, being a stockholder in the Georgia Rail Road & Banking Company, and a relative of defendants, did not preside in this case.

HILLYER, for plaintiff in error.

CORA, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] The error complained of is, that the Court below allowed the complainants to amend their bill. The complainants proposed to amend their bill, so as to make the allegation more distinct and specific in regard to the engineer scaling their accounts, so as to admit their testimony in relation to that subject. *Story's Eq. Pleading*, 678, §884. Pleadings in Equity cannot be amended on the appeal trial, as a matter of course, as was ruled by this Court in *Berry vs. Matthews*, 7 *Georgia Rep.* 457.

[2.] The *special cause*, shown to the Court below, why the amendment was not made at an earlier period, appears to have been satisfactory to that Court, and as we hold, in *Dearing vs. The Bank of Charleston*, (6 *Georgia Rep.* 584,) we reluctantly interfere with the discretion of the Court below, in allowing an amendment of the pleadings, in a suit in Equity. No injustice appears to have been done the defendants, by allowing the amendment in this case. Time was given them to answer the amendment, and so far as we can discover, the amendment was allowed in furtherance of justice, and we will not control the discretion of the Court.

Let the judgment of the Court below be affirmed.

No. 53.—SOUTHERN J. HIGGS, plaintiff in error, vs. THOMAS R. HUSON and THE JUSTICES OF THE INFERIOR COURT OF CASS COUNTY, defendants.

[1.] Under the Act of February, 1850, all defects in the bill of exceptions, writ of error and citation, may be amended *instantly*, and without costs, in conformity with the record of the cause below.

[2.] Affidavits of illegality are, upon motion and leave had, amendable *instantly*, by the insertion of new and independent grounds, provided the defendant will swear that he did not know of such grounds when the affidavit was filed.

[3.] Upon the trial of an illegality, the proof must be confined to the grounds taken in the affidavit.

[4.] The ordinary returns of a Sheriff, on process in his hands, are not traversable.

[5.] When a defendant is arrested and confined under a *ca. sa.* the fact of giving bond to appear and take the benefit of the Insolvent Debtor's Act, does not, in Law, discharge his property from execution under a *f. fa.*

Application for certiorari. Before Judge WRIGHT, at Chambers, 24th January, 1850.

On the 4th June, 1844, a *f. fa.* at the instance of Thomas R. Huson vs. Southern J. Higgs, was issued, returnable to the Inferior Court of Cass County. On 1st August, 1849, it was levied on a negro, as the property of defendant. To this *f. fa.* an affidavit of illegality was filed, on the ground, "that on 3d December, 1841, the defendant was arrested on a *ca. sa.* issued from the judgment on which this *f. fa.* is founded, and was duly confined in the common jail, and thence discharged, by giving bond and security for his appearance at May Term of the Inferior Court, 1842, to take the benefit of the Honest Debtor's Act, and that he was discharged from the arrest, under and by virtue of the laws of the land, in such cases made and provided; which is a complete discharge of the judgment."

At the November Term of the Inferior Court of Cass County, 1849, Higgs, by his counsel, moved to amend the affidavit of illegality, by inserting, that the discharge from arrest, under the *ca. sa.* was with the consent and by the order of the counsel of the plaintiff; which motion was refused by the Court. The defendant then proposed to prove this fact, which was also refused. The

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defendant then proposed to prove that an entry made on the *ca.* ss. dated 4th June, 1844, by R. M. Linn, then Sheriff of Cass County, as follows: "The defendant discharged from the above arrest, by order of the plaintiff's attorney, without having paid the debt," was a false entry, and that in fact defendant was discharged more than three years before that time, and before Linn was elected Sheriff; which motion the Court overruled.

On 24th January, 1850, the defendant below—Southern J. Higgs—applied to His Honor, Judge WRIGHT, for a writ of certiorari, to be directed to the Inferior Court, on the ground of error in the decisions above stated. The writ being refused, the decision of Judge WRIGHT is assigned as error.

MILNER, for plaintiff in error, cited the following authorities:

3 *Bl. Com.* 313, 347, 83, 321. 1 *Bos. & Puf.* 428. *Prince*, 431. 4 *Burr.* 2482. 6 *Term Rep.* 525, 526. 7 *Id.* 420. *Tidd's Pr.* 1069. *Jacob's Law Dic.* 394. 1 *Term Rep.* 557.

AKIN, for defendant in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] Exception was taken in this case to the pleadings. Upon a petition for a certiorari to the Inferior Court, Judge WRIGHT refused the writ. Upon a bill of exceptions, taken to his judgment thereon, the Justices of the Inferior Court are made parties to the bill, the writ of error and the citation. The exception is, that the joinder of the Justices is fatal to the whole case. Not so, even before the Act of the last Legislature. The record explains the whole case. From that, it appears to us that they have no interest in the cause, being judicial officers who tried the cause. That they are improper parties, is clear; but the pleadings may be amended by striking them out. Their names are merely surplusage. The case is well brought up without them—the pleadings are complete without them. Removing them from the record does not affect, in any way, the rights of the real parties.

The Act of 23d February, 1850, was brought before this Court, and a construction of it asked. It is a very unique little specimen of legislation, and illustrates, in a striking way, the *accidents*

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to which law-making is incident. The caption is "An Act in relation to the Supreme Court of this State," and the preamble is in the following words: "Whereas, it is essential to the proper administration of the law, that the sessions of the Supreme Court be held at such places as will afford the Judges the use of competent libraries, which is not the case under existing laws; for remedy whereof, be it enacted," &c. The evil which this preamble recites is, that the Supreme Court sessions are at places where they have not access to libraries, and to remedy this evil, the Legislature proceed to enact "That all bills of exceptions, writs of error and citations in or from the Supreme Court, shall be amendable, without delay or costs, in conformity with the record of the cases below;" and "That the Clerk of the Superior Court shall, in all cases, retain the bill of exceptions in his office, and send up a copy thereof to the Supreme Court, as a part of the transcript of the record, and no cost shall be charged in the Supreme Court for a copy of the bill of exceptions."

The antagonism between the preamble and the body of the Act, is as perfect as ingenuity could make it. The variance is so peculiarly perfect, as to become ludicrous. Were the variance between the *title* and the body of the Act, it would make it void, for unconstitutionality. There is no constitutional prohibition, however, against a variance between the Act and its *preamble*. By this Act, bills, writs and citations are amendable, without delay or costs, in conformity with the record of the case below. Under this Act, all defects in the pleadings are amendable, in conformity to the record. Such is our construction of the Act, and we shall cheerfully give effect to the legislative will.

[2.] It is claimed, first, that the presiding Judge erred in refusing to hold that the affidavit of a defendant in execution, upon the trial of an illegality, is amendable. In all the Courts of this State, the most liberal practice, as to the amendment of pleadings, obtains. In accordance with the policy of our legislation upon this subject, we do not see why the affidavit may not be amended. Almost any defect in pleadings is amendable in the Courts of Georgia, from the highest to the lowest. Our proceeding by illegality is a substitute for the old Common Law writ of *audita querela*. That was in the nature of a bill in Equity. Bills in Equity are amendable in almost every stage of the proceeding. Illegality are equitable proceedings—at least in the nature of equi-

table proceedings. We have held that a second affidavit of illegality cannot be put in. That is not the same thing with amending one already in. The former involves additional delay to the plaintiff in execution, in collecting his money; the latter does not. No service, or notice of the illegality, is required. An amendment, *instantly*, is no more a surprise upon the plaintiff, than was the affidavit itself. If the Statute authorizes the issue on an affidavit of illegality, without previous notice, why not authorize an amendment without notice? We hold the affidavit amendable, but not in every particular, or unconditionally. A defendant, for example, cannot so amend as to contradict or qualify the affidavit filed. This would defeat the objects and policy of the law against perjury. Nor can he amend by the addition of new grounds of illegality, known to him at the time of filing his affidavit. —

We hold, then, that he may amend at any time, by leave of the Court, by the addition of new and independent grounds, provided that he will swear that he did not know of such grounds when the affidavit was filed. As he did not so swear, in this case, we shall not, upon this ground, send the cause back.

[3.] The next complaint in this record is, that the Court erred in not holding that it was competent for the defendant to prove that the discharge from his arrest under the *ca. sa.* was with the consent and by the order of the counsel for the plaintiff. Whether a discharge by the counsel for the plaintiff, without proof of authority to do so from the plaintiff, would operate as a discharge, we do not decide. In the affidavit, but one ground of illegality is taken, and that is this, to-wit: the defendant being arrested on a *ca. sa.* for this debt, and being confined in jail, and having given bond and security for his appearance at the next term of the Inferior Court, to take the benefit of the Honest Debtors' Act, *is, by operation of law, discharged from the judgment.* This is the only ground taken. This ground is briefly this, to-wit: the giving bond to appear, when under arrest, discharges the debt. The motion refused was, to prove a discharge by the order and consent of the plaintiff's counsel. The proof cannot go out of the issue formed on the affidavit. The defendant is confined to the grounds therein taken. This additional issue would be by parol—there would be no record of it. If a departure were allowed as to one, it ought to be allowed as to every objection to the progress of the *fi. fa.* The end proposed

might be reached, by a motion, upon notice, duly entered upon the minutes, to set aside the judgment. This would be a proceeding, however, independent of the illegality. The Court did not err on this head.

[4.] The next ground is like this last, and cannot be sustained, for the same reasons. The defendant offered to prove that the entry on the *ca. sa.* was a *false entry*, and that, in fact, he had been discharged more than three years previous to the date of that entry. This ground of illegality is not in the affidavit, and could not be proven, for that reason. Besides, an official return of this sort, to-wit, an entry of a Sheriff on a *ca. sa.* or *fi. fa.* is not traversable. The party injured by a false return of this sort, is remitted to his action against the Sheriff. By the Act of 1840, returns made under or by virtue of any rule or order of the Court, and under oath, are traversable. *Hotchkiss*, 527. This Act, as we understand it, does not extend to the ordinary returns made by a Sheriff on processess in his hands.

[5.] The remaining proposition of the plaintiff in error is, that taking the facts stated in the affidavit to be true, the judgment is, in law, discharged: that is, that when a party is arrested under a *ca. sa.* and confined, and gives bond to appear and take the benefit of the Insolvent Debtor's Act, he is, in judgment of law, discharged, and therefore a *fi. fa.* cannot afterwards proceed legally against his property. What else transpired after the giving the bond, the record does not disclose. Our judgment is, that the mere fact of giving the bond for appearance, does not discharge the property of the defendant from liability to execution.

Let the judgment be affirmed.

Ford vs. Lane and others.

No. 54.—JOSEPH FORD, plaintiff in error, vs. ROBERT L. LANE and others, defendants.

[1.] Where a *scire facias* is issued on a bail bond against the principal and bail, jointly, and the Sheriff returns, "not to be found," as to the principal, the creditor may proceed to enter up judgment against the bail.

[2.] No assignment of the bail bond is necessary, by the Sheriff, to the creditor at whose instance the party was arrested. It inures to his benefit, under the Statute of this State, by operation of law, merely.

Scire facias, to charge bail. Decided by Judge WRIGHT, Floyd Superior Court, October Term, 1849.

Robert L. Lane being arrested on bail process, gave bond, with William Hardin and Robert Ware as sureties, payable to Wesley Shropshire, the Sheriff of Floyd County, and dated 13th December, 1838. In June, 1845, Houston Aycock, the then Sheriff of Floyd County, transferred the bond to the plaintiff in the action, Joseph Ford, who sued out a *sci. fa.* against Lane, Hardin, and the representatives of Ware, to charge them on the bond. Hardin and the representatives of Ware were served, and there was a return of "*nihil, &c.*" as to Lane, the principal. The sureties came in, by attorney, and pleaded to the action.

On the trial, at October Term, 1849, the bail, by their counsel, moved to dismiss the *sci. fa.* on the grounds—

1st. That it had not been sufficiently served on the defendant, Lane.

2d. That the bond was assignable by Wesley Shropshire only.

The Court sustained the motion on both grounds, and plaintiff excepted.

There being no appearance for the defendant in error, the case proceeded *ex parte*.

AKIN, for plaintiff in error.

By the Court.—LUMPKIN, J. delivering the opinion.

Two questions are made in this record—

1st. Upon a *scire facias* to charge bail, under our Statute, in

which the principal is joined, is it necessary that he should be served, before judgment can be entered up against the bail?

2d. Whether, when the bail bond is taken by the Sheriff, who has gone out of office, payable to himself alone, as Sheriff, and not to him and his successors, the assignment to the creditor can be made by the successor?

[1.] It was not necessary, we apprehend, in this case, to take any steps against the principal—our Statute authorizing bail, contemplates none. It directs, that upon the return of the *capias*, with the entry of *non est inventus*, that a *scire facias* should issue, returnable to the same Court in which the original judgment was obtained; which shall be served on the bail, at least twenty days before the return thereof; and after the return of the *capias* against the principal, and *scire facias* against the bail, and judgment thereon, (that is, on the *sci. fa.*) execution may issue against the principal and bail, or either of them, or either of their estates, unless the bail shall surrender the principal, at or before the entering up of final judgment on the *scire facias*, either in open Court, in term time, or to the Sheriff of the County in which such principal shall reside, at any time in vacation. *Prince*, 422.

Indeed, we hardly suppose it to be indispensable, that the principal should be a party to the bail bond at all. Chief Baron Comyns says, "the principal need not be bound with the bail." *Com. Dig. Bail. g. 2*. In England, a bail bond without a principal, has been held to be good. 8 *Coke*, 99, *b*. And the precedents in modern books of pleading, show the law to be so. 3 *Morg. Vade Mecum*, 391. 3 *Chitty*, 241.

But suppose it were otherwise, and because the principal was joined in the bond and in the *scire facias* with the bail, he had to be legally disposed of before judgment could be rendered against the bail. The Act of 1820, meets and provides for just such a case. It declares, that where two or more joint contractors or co-partners are sued in the same action, and service shall be effected on one or more of them, and a return made by the officer, that the other defendant or defendants are not to be found, it shall and may be lawful for the plaintiff to proceed to judgment and execution against the defendant or defendants, who are served with process, in the same manner as if he, she or they were the sole defendant or defendants. *Prince*, 446.

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I need hardly remark, that co-obligors in a bail bond are *joint contractors*. See note to *Prince*, 422.

And this construction cannot prejudice the rights of any party; for while it is true, that the property of the defendant not served, may not be bound by the judgment, yet all the property of the principal is bound by the first or original judgment—a lien prior in time to the judgment on the *scire facias*; and upon the discharge of the debt by the bail, under our Statute for the protection of bail, he would be entitled to control the original judgment for the purposes of reimbursement. If it were otherwise, however, it would only show, that notwithstanding the solicitude manifested by the Legislature to protect every description of securities, this was still a *casus omnis* in the law.

{2.] The second objection is this: the bail bond was made payable to Wesley Shropshire, the former Sheriff of Floyd County, and assigned to the plaintiff by Houston Aycock, his successor. Is any assignment by the Sheriff necessary?

I would remark, that there is a growing disposition manifested to sustain the validity of all such bonds, and of the proceedings under them, where they are substantially correct, and do not violate any fundamental provision of the law. Many cases to this effect, may be found cited in Sergeant *Williams' Notes to the case of Postorne vs. Hanson*, 2 Sand. 59.

In England, it is a matter of record, where bail above is put in; for, it is done by way of recognizance, in Court, or before some Judge or Commissioner—in which case it is returned to Court. In this State, it is taken by the Sheriff, out of Court; still, our Statute regulating bail in civil actions, and giving a *scire facias* against bail, it might be plausibly contended, at least, constituted the contract of bail a matter of record. It is required to be filed with the writ in the Clerk's office, for the security and benefit of all parties, and to be found whenever a writ of *scire facias* may be demanded. At any rate, whether it be a matter *in pais* or of record, the Judiciary Act does not require the bail bond to be assigned by the Sheriff to the creditor, at whose suit the party was arrested; and we think, that both the public justice, as well as the public convenience, justifies us in holding, that this *formality*, for it is nothing more, be dispensed with.

Upon both grounds, therefore, the judgment below must be reversed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT MILLEDGEVILLE,

MAY TERM, 1850.

No. 56.—THOMAS P. ELKINS, plaintiff in error, vs. WILLIAM H. EDWARDS, defendant.

[1.] When a creditor takes a mortgage to secure the payment of a promissory note, and the remedy on the latter is barred by the Statute of Limitations, his remedy, on the mortgage, is not necessarily barred—the debt being unpaid—but the creditor may avail himself of the statutory remedy to foreclose his mortgage, in satisfaction of his debt.

Motion for foreclosure of mortgage. Tatnall Superior Court, October Term, 1849. Decided by Judge HOLT.

This was an application to foreclose a mortgage upon land; resisted on the ground that the notes, to secure which, the mortgage was given, were barred by the Statute of Limitations. The Court held, that the action on the notes being barred, there was no remedy upon the mortgage, and dismissed the petition for foreclosure. The correctness of this decision is the only question involved in this cause.

R. M. CHARLTON, for plaintiff in error, cited—

Bank of Metropolis vs. Gutschlich, 14 Pet. 32. *Thayer vs. Mann*, 19 Pick. 535. *Miller vs. Helm*, 2 Smedes & Marshall, 697. 5 Ib. 651. 1 Bland. Ch. Rep. 281. 1 Comstock, 500.

Cole vs. Sarby, 3 *Esp. R.* 81, 160. 1 *Ala. (N. S.)* 743, '4. *Rigby vs. Great Western R. R. Co.* 14 *Mason & Welsby*, 815, '16. *Angel on Lim.* 486, 488, 490. 6 *Ga. Rep.* 176. 3 *Bingh.* 329. *Bell vs. Morrison*, 1 *Peters*, 351. 3 *Johns. Ch.* 218. 13 *East.* 439. 2 *Barn. & Ad.* 413. *Prince's Dig.* 228, '9, 423, '4.

SCHLEY and JENKINS, for defendant in error, cited—

Green vs. Hart, 1 *Johns.* 580. *Jackson ex dem. Barclay vs. Blodget*, 5 *Cow.* 202. 7 *Wend.* 94. *Hotchkiss*, 621, '2, 542.

Judge NISBET, being indisposed, did not preside in the first four cases decided at this term.

By the Court.—WARNER, J. delivering the opinion.

[1.] When a mortgage has been taken, to secure the payment of a promissory note, and the remedy on the note is barred by the Statute of Limitations, is the remedy on the mortgage also barred? We think not, for the reason, that the creditor stipulated, by contract, for two remedies against his debtor, to enforce the collection of his demand. One remedy was by suit upon the note, and having obtained judgment for the amount of the note, such judgment would bind all the property of the defendant. The other remedy was upon the mortgage, by petition and foreclosure, in the manner pointed out by the Statute. By this latter remedy, the creditor can sell the mortgaged property, in satisfaction of his debt. The creditor may pursue both remedies at the same time, until he obtains satisfaction of his debt. Although the remedy on the note may be barred, after the expiration of six years, yet, the debt is not extinguished. Suit may be maintained on a new promise to pay, and the note given in evidence as the consideration of such new promise.

Because the remedy on the note is barred by the Statute in six years, it does not follow that the creditor's remedy on the mortgage, being a sealed instrument, is also barred. The creditor's remedy on the mortgage is not barred until twenty years—the debt being unpaid. If the debt, or duty, is still owing, the creditor may adopt any lawful and appropriate remedy, for its en-

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forment. See *Miller vs. Helm*, 2 *Smedes & Marshall's Rep.* 697. *Doe ex dem. Duvall's heirs vs. McLosky*, 1 *Ala. Rep. (N. S.)* 744.

Let the judgment of the Court below be reversed.

No. 56.—JOHN LYNCH, administrator of R. Black, deceased, plaintiff in error, vs. MOSES PRESSLEY, et al. defendants.

- [1.] The levy and claim of personal property does not necessarily preclude the re-levy of the *f. fa.* pending the claim.
- [2.] Proof that the levy was dismissed by counsel for plaintiff in *f. fa.* for want of evidence to condemn the property, at the trial, satisfactorily accounts for the levy, so as to authorize the execution to proceed.
- [3.] The levy of an execution on personal property, sufficient to pay it, is not, *per se*, an extinguishment of the debt, but a satisfaction, *sub modo*, only.
- [4.] While the release or dismissal of a levy on personal property—the judgment being unsatisfied—might not operate as a discharge of the execution, as between plaintiff and defendant, the effect might be very different where the rights of third persons were concerned, upon a proper case made.

Levy and claim, in Putnam Superior Court. Decision by Judge JOHNSON, March Term, 1850.

This was an issue, upon a claim interposed by Moses Pressley, to property levied on by an execution in favor of plaintiff in error vs. Simeon Fuller, Jr. and Simeon Fuller. Upon the trial, the execution was offered in evidence, upon which appeared a former levy, as follows:

“Levied this *f. fa.* on the following named negroes: Clayton, a man, and Elias, a man, this 31st day of May.

W. T. SALMONS, Sheriff.

“Claim interposed by James M. Pressley, agent for Moses

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Pressley, for Clayton; one of the negroes, and, also, Elias, claimed by Sion Lee, for the other named negro. June 2d, 1847.

W. T. SALMONS, Sheriff."

On objection by claimant, the Court decided, "That the *fi. fa.* could not be given in evidence, on the ground that the levy was evidence of satisfaction of the execution, and that the plaintiff must prove, either that it was insufficient, or that the proceeds were applied to some prior lien, or that it was otherwise unproductive, without his fault." To which decision plaintiff excepted.

Plaintiff then proved by Junius A. Wingfield, that he caused the levy to be made, and prosecuted the same as attorney, before the Inferior Court, and finding that the evidence was insufficient to subject the property to the *fi. fa.* the levy was dismissed, and for that reason alone. In reply to question by claimant's counsel, he stated, that since the dismissal of the levy, he had ascertained the facts connected with the title to the negroes, and now knew facts enough to condemn the property as subject to the *fi. fa.*

The Court held the evidence insufficient to rebut the presumption of payment, and decided that the evidence showed that the levy was made unproductive by the plaintiff in *fi. fa.* through his counsel, in dismissing the levy.

To this decision plaintiff in *fi. fa.* by his counsel, excepted, and these two questions are submitted to this Court for review.

MERRIWETHER, for plaintiff in error.

N. G. FOSTER, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Can an execution which has been levied on personal property, which is claimed by a third person, be re-levied until the claim is disposed of? We are not prepared to say that it could not. A distress which will answer only part of the rent, may be followed up by immediately distraining again. *Bradley on Distress*, 130. Any other doctrine would be ruinous to creditors. A levy is made on a *modicum* of property, which, at a fair sale, would not pay a titling of the debt—a horse, for instance, to sat-

isfy a *fi. fa.* of a thousand dollars. A claim is interposed. Is the plaintiff compelled to wait until this issue is decided, before he can re-levy? And are his hands so tied, that the debtor may elude the rest of his effects, and thus defeat the judgment? We apprehend not.

[2.] As to the other question made in the record, whether or not the levy was satisfactorily accounted for, we hold that it was. Plaintiff's attorney testified, that at the trial he dismissed the levy, for want of proof to condemn the property. Would not a verdict, finding the property not subject, have placed the claimant in a worse condition than he now is? Had such a verdict been rendered, there can be no doubt but that this record evidence would have entitled the plaintiff to have proceeded against the present property which has been seized. Is it a good objection to it, then, when tendered in testimony, that the levy was dismissed to avoid this result? But it is said, that it was the fault of the party or his counsel, that the facts, which, it is admitted, have since been ascertained, and which would have been sufficient to have condemned the property, were not discovered earlier. There is nothing in the record to warrant us in coming to this conclusion. The most vigilant creditor is often forced to dismiss a levy, for want of proof, even to remove the onus; and yet, when the whole truth is subsequently developed, the property may not only be condemned, but damages given for putting in a frivolous claim. I have known such cases. The interest of creditors is the best guaranty that neither the defendant nor third persons will be improperly harassed by mere vexatious levies.

[3.] An idea prevails that it has been adjudicated by this Court, that the levy on personal property, to an amount sufficient to satisfy the execution, operates, *per se*, as an extinguishment of the judgment; and some *dictum*, perhaps, may have fallen from the Court to that effect, and authorities are certainly not wanting to sanction and sustain it. Numerous cases might be cited, where, in the strongest language, and without qualification, this doctrine is affirmed. *Clark vs. Withers*, 2 *Ld. Raym.* 1072. 1 *Salk.* 322, *S. C.* *Ladd vs. Blunt*, 4 *Mass. R.* 483. *Huyt vs. Hudson*, 12 *Johas. R.* 207. *Recd vs. Pruyn Stoats*, 7 *Ib.* 428, '9. 1 *Coven*, 47, note. 4 *Coven*, 417. 14 *Wend.* 262. And the reason given is, that by means of the levy, the debtor is deprived of his property.

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I am entirely satisfied, however, that the simple proposition, as thus enunciated, is not maintainable. Mr. Justice Cowen, in *Greene vs. Burke*, (23 Wend. 490,) has, with his usual industry and learning, examined all the cases bearing upon this subject, from *Mountney vs. Andrews*, Cro. Eliz. 237, (to which they all go back,) down to the present time, and the conclusion at which he arrives is, that the levy is not, *per se*, an extinguishment, but a satisfaction, *sub modo*, only. Nor do I understand my brother Nisbet to have asserted any other doctrine, in *Newson and others vs. McLendon and others*, (6 Ga. Rep. 392,) referred to in the argument. The substance of the rule, as there stated, is, that the levy may or may not operate as a satisfaction, according to circumstances; but that if it fail in part, or in whole, without any fault of the plaintiff, he may proceed with the precept. The facts stated in that bill, make a strong case for the interference of a Court of Equity; and apart from the dismissal of the levy upon the *fi. fa.* by the assignees of the plaintiff, the purchasers, under Warmock, were fully entitled to the relief which they prayed.

[4.] As between plaintiff and defendant, a bare release or dismissal of the levy—the judgment not being paid—is, I suppose, no satisfaction, under the Statute of this State, which gives a lien on all the defendant's property until the debt is discharged. As it respects third persons, however, *when a proper case is made*, the principle might be very different.

No. 57.—GWYNN ALLISON, plaintiff in error, vs. THOMAS CHAFFIN and another, defendants.

[1.] Where an appeal is entered, according to the Act of 1839, whenever there is more than one party plaintiff, or defendant, the party not appealing is bound by the first verdict; but as the whole record is taken up by the appeal, the plaintiff is not entitled to have execution against the party not appealing, until the final trial on the appeal.

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[2.] Where a verdict and judgment has been rendered against three defendants, in the Inferior Court, and one of them only enters an appeal to the Superior Court, and, upon the appeal trial, a verdict and judgment was rendered against the parties not appealing: *Held*, that the judgment so rendered against the parties not appealing, was irregular, and should be vacated.

Motion to set aside a judgment, in Greene Superior Court. Decided by Judge JOHNSON, March Term, 1850.

This was a motion to set aside a judgment against Chaffin and Dickinson, upon the following agreed statement of facts:

"Suit was instituted in Greene Inferior Court, against Chaffin and Dickinson, and one John W. Battle, upon a joint and several promissory note, made by Chaffin as principal, and by the firm of Dickinson & Battle as securities. At the time, Battle resided in Greene County, and Chaffin and Dickinson in Taliaferro. Judgment was rendered, in the Inferior Court, against all the defendants, from which judgment Battle alone appealed. On the appeal, Battle filed three pleas: 1st. The general issue. 2d. Notice to plaintiff to sue Chaffin, and failure to comply within proper time. 3d. That the firm name was signed by Dickinson, without any authority from Battle, or resulting from their co-partnership. Upon the trial of the appeal, there was a verdict for Battle, and against Chaffin and Dickinson; and on this verdict the judgment was rendered."

The motion to set aside was on the ground—

1st. That if the verdict of the Jury was in favor of Battle, on the second plea, the notice to sue enured to the benefit of the firm of Dickinson & Battle, and Battle being discharged, Dickinson was also discharged, and the judgment is a nullity.

2d. That Battle being the only defendant resident in Greene County, and being discharged on the third plea—that he had never been bound as a co-obligor—the Courts of Greene County were ousted of jurisdiction over the non-resident defendants; or, rather, the Court never had jurisdiction—there being no co-obligor residing in said County; and the judgment is, therefore, a nullity.

3d. That the suit being a joint action upon a joint contract, and it appearing, by the verdict, that Battle had never been a party to the contract, no judgment could be legally entered up on the verdict, against Chaffin and Dickinson.

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The Court overruled the first ground, but sustained the second and third grounds, and granted the motion.

To which decision, sustaining the second and third grounds, and granting the motion, Allison excepted.

CONE, for the plaintiff in error, submitted the following points and authorities :

1st. If the Court has jurisdiction at the time of the commencement of the action, such jurisdiction cannot be divested by any thing subsequent. *Mollan vs. Torrance*, 9 *Wheat.* 537. *Read vs. Renaud*, 6 *Smedes & Marsh.* 79.

2d. Courts will not entertain motions to set aside judgments, after any considerable lapse of time. *Soldan & Smith vs. Cook*, 4 *Wend.* 217. *Saffold vs. Kenan*, 2 *Kelly Rep.* 341. *Evans vs. Rogers*, 1 *Kelly*, 466.

3d. An appeal of one of several defendants does not vacate the judgment as to the other defendants. *Hotchkiss*, 601. *Stell vs. Glass*, 1 *Kelly*, 483, 485.

4th. In writs of error, all parties in the Court below must join, and be joined. If some choose not to prosecute the writ, there may be judgment of severance. *Shirley vs. Lunenburg*, 11 *Mass.* 379. *Denale vs. Stump*, 8 *Peters*, 526. *Jameson vs. Coleburn*, 1 *Stew. & Port.* 253.

5th. Where nothing appears upon the face of the proceedings, to show a want of jurisdiction, and the objection is not made in the Court below, it cannot be taken in the Court above. *Vance vs. Vosch*, 3 *Hill*, (S. C.) 237. *Beaubain vs. Brinkerhoff*, 2 *Scam.* 269. *Wells vs. Mason*, 4 *Ib.* 84. *Vance vs. Funk*, 2 *Ib.* 263.

A. H. WINGFIELD, for defendant, submitted the following points and authorities :

1st. The Court rendering said judgment, had no jurisdiction, by law, over the persons of the defendants. *Prince*, 910, 419, 421. *Hotchkiss*, 67. *Bank of Vicksburg vs. Jennings*, 5 *How. Miss. R.* 425.

2d. The Court, having no jurisdiction, by law, could not derive it from any other source. Neither waiver, or want of plea, or consent of parties, or even judgment by default and subsequent

consent-rule to plead to the merits, can confer jurisdiction. *Wyatt vs. Judge*, 7 *Porter*, 37. *Hart vs. Mallett*, 2 *Hay. Rep.* 136. *Dickens vs. Ashe*, 2 *Hay. Rep.* 176. *The King vs. Commissioners*, &c. 7 *East*. 80. *Bell vs. Tombigbee R. R. Co.* 4 *S. & M.* 549. *Burroughs vs. McNeil*, 2 *Dev. & Bat.* 301. *Jacob Waggoner vs. Jno. Groves*, *North Ca. Conf. R. by Battle*, 563. *Prince*, 427. 4 *Ga. Rep.* 50. 5 *Ib.* 529. 3 *Chit. Prac.* 525. *Taylor vs. Phillips*, 3 *East*. 155. *Roberts vs. Monkhouse*, 8 *East*. 547. 1 *Chit. R.* 400. *Osborne vs. Taylor*, 18 *Eng. Com. Law Rep.* 115. 2 *Chit. R.* 237, or 18 *Eng. Com. Law Rep.* 317. 4 *Ga. Rep.* 50. *Mortimer vs. Piggatt*, 2 *Dowl.* 616. *Roberts vs. Spurr*, 3 *Dowl.* 554. *Welsh vs. Lywood*, 1 *Bing. New Cases*, 258, cited in 3 *Chit. Prac.* 527.

3d. A Court is bound, *ex mero motu*, to notice its want of jurisdiction, and to stay proceedings, though its power in the premises be not questioned by the parties litigant. *Stumps vs. Newton*, 3 *How. Miss. R.* 34. *Ketland vs. The Cassius*, 2 *Dall. R.* 368. *Burroughs vs. McNeil*, 2 *Dev. & Bat. Eq. Rep.* 301. *Pollard vs. Patterson*, 3 *Hcn. & Munf.* 67. *Hickman vs. Stout*, 2 *Leigh*, 9. *Kelso vs. Blackburn*, 3 *Leigh*, 299. See 3 *Chit. Prac.* 527, and cases there cited.

4th. The Court, not having jurisdiction, its proceedings are void, (not voidable,) *ab initio*; its writ, the instrument of usurpation; its judgment, a nullity; and its enforcement, a trespass. 2 *Chit. Prac.* 307. 3 *Chit. Prac.* 75. *Ham. Ni. Prius*, 49, 50. 10 *Coke*, 76, or *Coke Abridg.* 300. (*Marshalsea*.) *Kentworthy vs. Peppiot*, 4 *Bar. & Ald.* 288, or 6 *E. C. L. Rep.* 426. *Ketland vs. The Cassius*, 2 *Dal.* 368. *Stumps vs. Newton*, 3 *How. Miss. R.* 34. *Luthem vs. Edgerton*, 9 *Cowen*, 229, 230. *Burroughs vs. McNeil*, 2 *Dev. & Bat. Eq.* 301. *Bigelow vs. Stearns*, 19 *Johns. R.* 40. 15 *Ib.* 141. *Elliott vs. Pierson*, 1 *Peters*, *S. C.* 340. *Fisher vs. Harnden*, *Paine Cir. C. Rep.* 431. *Westervelt vs. Lewis*, 2 *McLean*, 50. *Bell vs. Tombigbee R. R. Co.* 4 *S. & Mar.* 563. 2 *Wils.* 385. 4 *Ga. Rep.* 49. 5 *Ib.* 530, 531.

5th. The judgment, for want of jurisdiction, being a nullity, and its enforcement a trespass, the exception may be taken, and judgment vacated at any time. 3 *Chit. Prac.* 75, 523 to 525. 1 *Peters*, 340, (*Elliott vs. Pierson*.) *Hickman vs. Armstrong*, 2 *Brevard*, 177. *Bell vs. Tombigbee R. R. Co.* 4 *Smedes & Mar. Miss. Rep.* 563. *Luthem vs. Edgerton*, 9 *Cowen*, 229, 30. *Bor-*

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den vs. Fitch, 15 *Johns. R.* 141. *Bigelow vs. Stearns*, 19 *Johns. R.* 40. 5 *Ga. Rep.* 530.

6th. The question as to the effect of the appeal by *one only* of the several defendants, to the judgment in the *Inferior Court*, did not legitimately arise on the hearing of the motion to vacate the judgment upon the appeal; nor will this Court consider it. *Smith vs. Kershaw*, 1 *Kelly*, 259. *Sampson vs. The Commonwealth*, 5 *Watts & Serg.* 385. *Kirby vs. Wood*, 4 *Shep.* 81.

7th. An appeal by one defendant entures to the benefit of all. *Lewis vs. Thornton*, 6 *Munf.* 87. 3 *Murph.* 309. 2 *Tyler*, 396. 2 *Leigh*, 399.

8th. If not, the plaintiff has waived the irregularity in this case. 1 *Kelly*, 95.

9th. If the party appealing alone is bound, this judgment is surely void as to the parties now moving to vacate.

By the Court.—WARNER, J. delivering the opinion.

[1.] The main question for our consideration and judgment, presented by the record before us, is, as to the proper construction to be given to the Act of 1839, authorizing either party to a suit, where there is more than one plaintiff or defendant, to enter an appeal. The first section of the Act declares, that "when-ever there shall be more than one party, plaintiff or defendant, and one or more of said parties, plaintiff or defendant, desire to appeal, and the other, or others, refuse or fail to appeal, it shall and may be lawful for any party, plaintiff or defendant, to enter his appeal, under such rules and regulations as are now provided by law."

The second section of the Act declares, "that upon the appeal, either of the plaintiff or defendant, as aforesaid, the whole record shall be taken up; but in case damages shall or may be awarded upon such appeal, such damages shall only be recovered against the party or parties appealing, and their securities, and not against the party or parties failing or refusing to appeal." *Hotchkiss Dig.* 601. There is great difficulty in giving such a construction to this Act, as will prevent all practical inconvenience. The best view to take of it, however, in our judgment, is, to regulate the rights of the parties according to their own action in the matter. Where one of the parties, either a joint plaintiff or de-

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fendant, is *satisfied* with the first verdict, and is unwilling to litigate further, the first verdict, as to him, ought to be conclusive as to his rights; not so with the party who is *dissatisfied*, and desires to litigate his rights on the appeal.

The result of the trial, on the appeal, may increase or reduce the first verdict. If the verdict shall be increased, then the party not appealing, ought ~~not~~ to be prejudiced by it, as he was no party to the appeal, ~~but was~~ entered against his wishes and consent. If the verdict shall be reduced on the appeal, then the party not appealing, has no right to complain, for his failure to enter an appeal was his own act, and he must abide the result of his own action in the premises.

But as the whole record goes up on the appeal, no execution can issue against the party not appealing, until after the trial on the appeal.

[2.] It appears, from the record before us, that suit was instituted by Allison, the plaintiff, against Chaffin, as principal, and Battle & Dickinson, as securities, upon a joint and several promissory note, in the Inferior Court of Greene County. Battle resided in the County of Greene, and Chaffin and Dickinson in the County of Taliaferro. Upon the trial in the Inferior Court of Greene, judgment was rendered against all the defendants, without any objection having been made to the jurisdiction of the Court.

Battle alone entered an appeal to the Superior Court, from the verdict rendered against him in the Inferior Court; Chaffin and Dickinson did not appeal. After entering the appeal, Battle filed three pleas: 1st. The general issue. 2d. Failure of the plaintiff to sue the principal in the note, within the time prescribed by the Statute, after notice to do so by Battle, the security. 3d. That the firm name of Dickinson & Battle was signed to the note by Dickinson, without authority of Battle, either express, or resulting from their copartnership. On the appeal trial, a verdict was found in favor of Battle, but the Jury found a verdict against Chaffin and Dickinson, the parties not appealing, for the principal and interest due on the note, with costs. It does not appear affirmatively, on the face of the record, on which of the pleas filed by Battle, the Jury found a verdict in his favor, although there is strong presumptive evidence that they found in his favor upon the second plea, that the plaintiff failed to sue within time, after notice.

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A motion was made in the Court below, to set aside and vacate the judgment against Chaffin and Dickinson, rendered on the appeal, upon the ground, as we understand from the record, that inasmuch as the Jury found in favor of Battle, the only defendant living in the County of Greene, and one of his pleas denied the authority of Dickinson to sign his name to the note, therefore, neither the Inferior nor the Superior Court, in the County of Greene, had any jurisdiction to award the judgment against the other two defendants, who resided in the County of Taliaferro; that the jurisdiction of the Court depended alone on the fact of Battle being a joint promissor in the note. We will first consider the question of jurisdiction. When the suit was instituted in the County of Greene, the defendants were sued as joint promissors. Upon the face of the record, the Court had jurisdiction, for joint promissors, living in different Counties, may be sued in either County. There was no plea to the jurisdiction by either of the defendants. But it is said, on the appeal trial, Battle, by one of his pleas, denied his name was signed to the note by his authority, and the Jury having found a verdict in his favor, therefore, there never was a joint promissor residing in the County of Greene, which could give the Courts in that County jurisdiction of the other parties, who resided in another County. The record shows, that at the time the suit was instituted, the Court in Greene had jurisdiction of all the parties. Conceding that the finding of the Jury, on the appeal trial, in favor of Battle, upon his plea denying he was a joint promissor, would oust the jurisdiction of the Court, yet, it does not *affirmatively* appear that the Jury found their verdict upon *that plea*. The legal presumption is in favor of the jurisdiction of the Court rendering the judgment, unless the want of jurisdiction appears on the face of the record, which is not pretended in this case.

In order to oust the jurisdiction of the Court, a clear case should be made, which, in our judgment, is not the fact here. As before remarked, this record affords strong presumptive evidence that the Jury found a verdict in favor of Battle, upon his second plea; but in order to oust the Court of jurisdiction, it ought to be made clearly to appear, that the verdict was, in fact, found upon his third plea, which denied he was a joint promissor with the other defendants. Battle did not deny the execution of the note, *on oath*, as required by the Judiciary Act of 1799, which is ano-

their strong presumption that the Jury did not find in his favor on that ground. Besides, the argument for the defendant in error, proves too much for his own case. If the Court had no jurisdiction to award judgment *against* Chaffin and Dickinson, in the County of Greene, then, it follows, as a necessary consequence, that the Court had no jurisdiction to award a judgment in *favor* of Battle. If the Court had no jurisdiction, the whole proceedings are *coram non iudice*, and a nullity.

According to the view we take of the Act of 1839, when Battle entered his appeal, the whole record was taken up to the Superior Court, but the judgment rendered against Chaffin and Dickinson, in the Inferior Court, was not vacated by the appeal of Battle. The appeal by Battle only vacated the judgment as to him, but left it in full force as against the parties not appealing, with the right of the plaintiff to have execution against them, whenever the appeal trial shall be decided—inasmuch as the whole record is taken up by the appeal. Chaffin and Dickinson not appealing from the first verdict, the Jury, on the appeal trial, were not authorized to find a verdict against them, who were not before the Court by their consent. The judgment rendered against them in the Superior Court, on the appeal trial, was properly vacated by the Court below, for the reason which we have stated; and on that ground alone, we affirm the judgment of the Court below.

No. 58.—AMBROSE CHAPMAN vs. JAMES M. GRAY.

[1.] A copy of the writ of error must be served on the defendant in error, or his counsel, within ten days from the signing and certifying of the bill of exceptions. This right, however, may be waived by the defendant or his counsel.

[2.] When a party has neglected to comply with any rule of practice, the Court will not entertain an argument which seeks to screen the party from the penalty of his failure, by showing that the rule itself is inexpedient.

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[3.] The rules of the Court are the law of the Court, until repealed, unless they are repugnant to the Constitution and Statutes of the State.

The defendant in error joined issue with a protestation, and moved to dismiss the writ on error—

1. Because no copy of the writ of error was served on the defendant or his counsel.

2. Because the bill of exceptions does not specify the errors complained of.

The following acknowledgment appeared on the citation:

"I acknowledge, hereby, service of the within citation and notice, and the notice of the signing and certifying of the bill of exceptions is hereby acknowledged, and waive other and farther notice. This 16th April, 1850.

ROBT. V. HARDEMAN, Defendant's Attorney."

The bill of exceptions, after stating the decision of the Court affirming the judgment appealed from in the Court of Ordinary, added, "To which decision of the said Court, and the judgment thereon, affirming the judgment of the Court of Ordinary, the said Chapman excepts, and tenders," &c.

CONE, for the motion,

CHAPPELL, contra.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The only ground taken in this motion, which we deem it necessary to notice, is, that no copy of the writ of error was served on the defendant or his counsel. The 21st Rule of this Court requires that this should be done within ten days from the signing and certifying of the bill of exceptions. *Manual*, 31. And a failure to comply with this provision would be fatal to the plaintiff's case.

[2.] The position assumed in the argument is, that the rule itself is useless, and it is sought, for this reason, to screen the party from the consequences of his neglect. This Court cannot, and will not entertain such an argument, or sustain such an excuse.

The Legislature has clothed the Judges of the Supreme Court with the discretion of establishing Rules of Practice. §14 of the Act of 1845. This power is inherent in all Courts.

[3.] The rules of this Court are the laws of the Court, and must be obeyed, until repealed, unless it can be shown that they are repugnant to the paramount law; and this is not pretended in the present instance. All judicial rules are judicial legislation. But this constitutes no good objection to their validity. I venture the assertion, that there is not an appellate tribunal in the Union, whose rules are so few and simple. The Supreme Court of New York, under the new code, in which reform is supposed to have been carried to the *ne plus ultra* of attainable perfection, at a general session of the Judges, established, at the beginning, 92 Rules of Practice, occupying an octavo pamphlet of 57 pages. Our whole number now is 33, filling some ten pages of our duodecimo manual; and a large portion of these were rendered necessary by the anomalous attitude in which we were placed, by having to devise a plan to engraft the writ of error, designated by the amended Constitution, as the mode of bringing up cases, upon the bill of exceptions, provided for by the Act organizing this Court. The only inference to be drawn from the omission by the General Assembly to act in the matter, is, that they designed to delegate this delicate and important trust entirely to the Court itself.

Labor is naturally irksome, and to avoid it, which one of our rules has not been assailed? The 14th, for example, making it the duty of the plaintiff in error, or his counsel, to furnish each of the Judges and the Reporter, with a copy of the bill of exceptions, and a note of the points intended to be made, together with a statement of the facts in the cause, has been constantly complained of, as imposing an unnecessary and intolerable burthen.

By reference to the 32d of the New York rules, it will be seen, that the appellant, as here, is required to furnish the papers for the Court, which consists of a certified copy of the judgment roll, together with a case, stating the time of the commencement of the suit, and of the service of the respective pleadings, the names of the original parties in full, the change of parties, if any has taken place pending the suit, with a brief history of the proceedings in the cause, and containing an abstract of the plead-

ings, to which shall be added the reasons of the Court below for its judgment, if the same can be procured; and at the commencement of the argument, the appellant is required to furnish a *printed* copy of the papers to each of the Judges, together with a *printed* copy of the points on which he intends to rely, with a reference to the authorities which he intends to cite; and he shall also deliver to the attorney of the adverse party, at or before noting the said appeal for trial, *three printed* copies of said papers; and at the commencement of the argument, each party shall serve upon his adversary, a *printed* copy of his points and authorities on which he intends to rely; and in case the appellant neglects to comply with these regulations, his opponent is entitled to move, at the earliest practicable day, that the cause be stricken from the calendar, and that judgment be rendered in his favor. And I would remark, by way of answer to the complaint, that causes are too often dismissed here for defects in the pleadings, without being heard on their merits; that the foregoing clause, "that the cause be stricken from the calendar," &c. is one of frequent recurrence in the New York, and every other system of rules.

What a contrast in expense and labor, to our code, do these rules exhibit! We have the cheapest and most expeditious judiciary in the world; and the faults in its administration are attributable to these very excellencies—*excellencies for which, in my humble judgment, nothing can compensate.* To expect infallibility or exemption from error, however, under the circumstances, and especially without sharing the labor with us, by supplying the necessary facilities for adjudicating causes, is as unreasonable as the edict of Pharaoh, which exacted the usual tile of brick from the Israelites, without furnishing the proper allowance of straw and mortar for their manufacture.

Regretting, as we always do, to dismiss a writ on account of any irregularity in the papers or proceedings, we have scrutinized closely the record, with a view, if possible, to save it. Counsel for the defendant in error acknowledges service of the citation notice, and *waives other and farther notice.* By giving a liberal construction to this acknowledgment, it may be applied to a copy of the writ of error—indeed, it is difficult to apply it to any thing else. The defendant is required to be served with this pro-

cess, for his benefit. It is competent, however, for him to waive it, and this, we think, he has virtually done.

Considering, then, as we do, that there is nothing in the other grounds, the motion to dismiss the writ of error must be refused.

No. 58.—AMBROSE CHAPMAN, plaintiff in error, vs. JAMES M. GRAY, executor, &c. defendant.

[1.] A valid agreement may be made between husband and wife, through the intervention of a trustee, for an immediate separation, and for a separate allowance to the wife, for her support.

[2.] The agreement for a separation cannot be supported, unless the separation takes place immediately upon the execution of such agreement. Of course it will be good where the separation has already taken place.

[3.] An agreement for a separation will be rescinded, if the parties afterwards cohabit or live together, as husband and wife, by mutual consent.

[4.] When the decisions of the Ecclesiastical Courts are in conflict with the adjudications of the Courts of Common Law and Chancery, in England, on a question of property, the latter are the highest authority, and must prevail in this State.

[5.] Where valid articles of separation, give to the wife the power to dispose of the property, at her death, settled for her provision for life, as she may choose to do, a *will* by her, while a *femme covert*, will be supported.

Motion to revoke probate of will. Jones Superior Court. Before Judge JOHNSON, April Term, 1850.

By articles of separation entered into between Ambrose Chapman and Grace Chapman, his wife, and James Smith, as trustee for the wife, dated 7th April, 1843, it was recited, that Chapman and his wife having "agreed to live separate and apart in future; and the said Ambrose Chapman, for the purpose of restoring to her, the said Grace Chapman, the property that she owned before the intermarriage, and, also, of his own being unincumbered in future on her account," conveyed to Smith, as trustee, twenty-two negroes, and other personal property, "for the separate use, benefit and behoof of her, the said Grace Chapman, during her natural life, and she is vested with the power to will and dispose of the same, after her death, as she may choose to do."

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— And it is agreed, on the part of the said Grace Chapman, in consideration of the above provisions, that she is never to claim dower, in any event, or any other claim or interest in the estate or property belonging to said Ambrose Chapman; each one to be separately and distinctly divorced from bed and board, and not accountable, in future, for each other's debts or contracts; and for the true and faithful compliance with this agreement, the said parties—the said Ambrose, on his part, and said James Smith, as trustee for said Grace Chapman, afore-said, and, also, the said Grace, on her part—have hereunto set their hands and seals.”

In pursuance of the power given, on the 23d November, 1843, Grace Chapman executed a will, disposing of all the property mentioned in the articles of separation; which will was proven in common form, and admitted to record.

At the January Term, 1850, of the Inferior Court of Jones County, sitting as a Court of Ordinary, Ambrose Chapman, by counsel, moved to set aside the probate, on the ground that Grace Chapman was a married woman, and had no legal authority to make a will disposing of the property named; which motion was resisted by the executor, on the grounds—

1st. Because the said will was made by the assent of Ambrose Chapman.

2d. Because it disposes only of the sole and separate property of the decedent, which she had a right to do.

3d. Because the application to set aside the probate is too late—the application being after the probate thereof.

4th. Because, under the articles of separation, Grace Chapman had a right to make this will.

The Court of Ordinary refused the motion, and Ambrose Chapman appealed.

Upon the hearing of the appeal, it was agreed by the parties, in addition to the above facts, that Chapman and wife lived separate and apart, after the execution of the articles of separation.

The Judge presiding in the Superior Court, sustained the decision of the Court of Ordinary upon the *first, second* and *fourth* grounds taken in the response of the executor.

To which decision Chapman filed exceptions, and appealed to this Court.

A. H. CHAFFELL, for plaintiff in error.

R. V. HARDEMAN and CONE, for defendant.

R. V. HARDEMAN, for defendant, made the following points, and relied on the authorities cited—

1st. That a wife, by the consent of her husband, may make a will of chattels. 2 *Black. Com.* 416. 1 *Roberts on Wills*, 23, '4. *Reeve's Domestic Relations*, 141, '6. 1 *Williams on Executors*, 41, '3, '5, '7, '8. *Sheppard's Touchstone*, 402, '3. 2 *Kent's Com.* 170.

2d. That articles of separation between man and wife, are good and valid, both at Law and Equity. *Reeve's Domestic Relations*, 90 to 97. *Atherley*, 196. *Clancy on Rights*, 397 to 420.

3d. That the property disposed of, was the separate property of Grace Chapman, and she had a right to dispose of her separate property, by will, without the consent of her husband. *Reeve's Domestic Relations*, 142, '5, '6, '8. 1 *Williams on Executors*, 46. *Clancy on Rights*, 308, '9.

4th. That said will is good and valid, because made by virtue of a power contained in the articles of separation. 1 *Williams on Executors*, 44, '5, '6, '8. 2 *Kent*, 171.

CONE, for the defendant in error, submitted the following—

A deed of separation between husband and wife, and trustee, contemplating an immediate separation, and exonerating the husband from the debts and contracts of the wife, is a valid contract. *Clancy on Rights*, 399 to 405. 2 *Roper on Property*, 272. *Guth vs. Guth*, 3 Bro. C. C. 504. *Carson vs. Murray and others*, 3 *Paige's C. Rep.* 483. *Atherley on Settlements*, 196, 199. *Wagner vs. Ellis*, 7 Barr, 411. *Munn & Ladbroke vs. Mary Wilmore*, 6 Term Rep. top page, 284. *Huldon vs. Ducey*, 3 Barr, 100. *Beetle vs. Wilson*, 14 Ohio, 257. *Jee vs. Thurlow*, 3 Barn. & Cress. 547. *Compton vs. Collinson*, 2 Bro. C. 298. 1 *H. Black.* 334.

By the Court.—LUMPKIN, J. delivering the opinion.

This case has been thoroughly discussed on both sides—few, if any, have been better argued at this bar; and if the law is mis-

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apprehended. the fault will not, certainly, be at the door of the learned counsel.

The question to be decided is this: may a valid agreement be made between husband and wife, through the intervention of a trustee, for an immediate separation, and for a settlement of property upon the wife, by way of separate allowance, with the power of testamentary disposition after her death?

The articles recite, that the object of the husband was to restore to the wife the property she owned before the intermarriage, and to have his own unincumbered, in future, on her account; and for this purpose, certain negroes and other property, therein mentioned, are conveyed to the trustee for the wife, during her life, and she is vested with the power to will and dispose of the same, after her death, as she may choose to do; and in consideration of this provision, the wife agrees, that she will never claim dower in any event, or any other interest in the estate of her husband; it is farther stipulated, that, in future, they are not to be accountable for each other's debts or contracts; and for the true and faithful compliance with the agreement, the husband, wife, and the trustee in behalf of the wife, sign and seal the instrument.

It is agreed, that from the time the articles were executed, that the parties lived separate and apart from each other, till the death of the wife, who disposed of the property settled upon her, by will—the probate of which the husband now resists, on the ground that the contract of separation was illegal and void.

[1.] Are these articles valid, and will they be recognized and enforced in this State?

It is undoubtedly true, that the Ecclesiastical Courts of England consider a private separation as an illegal contract, implying a renunciation of stipulated duties, or dereliction of those mutual offices which the parties are not at liberty to desert—an assumption of a false character in both parties, contrary to the real *status personæ*, and to the obligations which both of them have contracted, in the sight of God and man, to live together, “till death doth them part;” and on which the solemnities, both of civil society and of religion, have stamped a binding authority, from which the parties cannot release themselves, by any private act of their own, or for causes which the law itself has not pronounced to be sufficient, and sufficiently proven. *Shelford on Marriage*

and Divorce, 580. *Mortimer vs. Mortimer*, 2 Hagg. Cons. Rep. 318. *Warrender vs. Warrender*, 2 Clark & Finn, 561, '2. *Nash vs. Nash*, 1 Hagg. Cons. R. 142.

In *Smith vs. Smith*, Consistory, 1781, cited 2 Hagg. Eccl. Rep. 44, n. in a suit by the husband, for the restitution of conjugal rights, the wife pleaded articles of separation, with a clause, that the husband should not proceed in the Ecclesiastical Court. This plea, however, was overruled, and Dr. Wynne observed, "That he believed it was the first time the question had come directly before it, and was surprised that it should be brought forward."

In *Evans vs. Evans*, (1 Hagg. Cons. Rep. 36,) Lord Stowell, with his usual elegance and felicity of thought and language, remarks, "The law has said that married persons shall not be legally separated, upon the mere disinclination of one or both, to cohabit together. The disinclination must be founded on reasons which the law approves, and it is my duty to see whether those reasons exist in the present case. It must be carefully remembered, that the general happiness of the married life is secured by its indissolubility. When people understand that they must live together, except for a few reasons known to the law, they learn to soften, by mutual accommodation, that yoke which they know they cannot shake off—they become good husbands and good wives, from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes. If it were once understood, that upon mutual disgust, married persons might be legally separated, many couples who now pass through the world with mutual comfort, with attention to their common offspring, and to the moral order of civil society, might have been, at this moment, living in a state of mutual unkindness—in a state of estrangement from their common offspring, and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good."

It must be conceded, also, that the highest authorities, both in the Common Law and Equity Courts, have maintained, that deeds of separation are at variance with the policy of the law; and the very Judges who have given effect to such deeds, have declared, that they did it with reluctance, and would have paused if the question had been new. *Beard vs. Webb*, 2 Bos. & Pul.

93. *Lord St. John vs. Lady St. John*, 11 Ves. 526. *Marquis of Westmeath vs. The Countess of Westmeath*, Jacobs' R. 126.

Lord Eldon, in delivering his opinion in *Westmeath vs. Salisbury*, (5 Bligh. R. N. S. 375,) where this subject is elaborately discussed, thus expresses himself: "According to the law of this country, marriage is an indissoluble contract. It can only be dissolved by the Courts or the Legislature; and that contract once entered into, imposes upon the husband and wife, both with respect to themselves and with respect to their offspring, most important and sacred duties—so important and so sacred, that it does seem a little astonishing that it ever should have happened, that it should be thought they could, by a mutual agreement between themselves, destroy all the duties they owe to each other, and all the duties they owe to their offspring."

And yet this cannot be regarded an open question, if an unbroken series of decisions, both before and since our revolution, as well in the Courts of Common Law as of Equity, in England, and I might add in this country, are to be regarded as evidence of what the law is upon this subject. For, it will be found, that while many eminent Judges have expressed their regret at the existence of the rule, no Court, as yet, has ventured to overturn it.

Sir William Grant, in *Norvall vs. Jacob*, (3 Mer. 268,) admitted, "that the decisions were too numerous and uniform to be easily shaken." And in *Ross vs. Willoughby*, (10 Price, 2,) where a general demurrer was put in to a bill praying an account of assets, and payment of the arrears of an annuity secured by covenant, in a deed of separation, executed between a wife and her former husband, and the question as to the validity of such contracts being very fully discussed, the demurrer was overruled—Chief Baron Richards, saying, "if we allow the demurrer, we shall overrule many solemn decisions. I am of opinion with Lords Eldon and Loughborough, that it would have been well if such contracts had not been held to be binding for any purpose; but the question is not what the law ought to be, but what it is; and the opinions of Judges, however great and learned, are not to be put in competition with decisions determining the point and settling the law."

In *Jee vs. Thurlow*, (4 Danl. & Ry. 11. 2 Barn. & Cress. 547,) Justice Bailey said, "A system of jurisprudence so long acted

on, as that which has held deeds of separation, made with the approbation of trustees, and not prospective in their nature, as valid and binding instruments, cannot be overturned upon a vague notion that it is inconsistent with the public policy. This Court, (*King's Bench*), after the numerous authorities which have declared such deeds legal, is not competent even to inquire whether they are so or not."

Innumerable other cases might be cited from the English reports, equally applicable to establish the proposition, that an agreement between husband and wife, for immediate separation and a separate maintenance, through the medium of a trustee, have been deemed valid engagements, and their stipulations have been uniformly sustained and enforced against the husband.

The same doctrine prevails in the Courts of this country. Judge Story admits that the Courts have gone too far in upholding this doctrine to retrace their steps, even if it were as unquestionable and salutary in morals and policy to do so, as it has been thought to be. 2 *Stor. Eq. Jur.* §1427.

In *Bettle vs. Wilson*, (14 *Ohio R.* 257,) it was held, that articles of separation by husband and wife, through the medium of a trustee, for the separate support and maintenance of the wife, and where the separation actually takes place, in pursuance of the agreement, are not void, *as against public policy*.

In *Blaker vs. Cooper*, (7 *Serg. & Rawle*, 500,) the validity of these contracts is affirmed by the Supreme Court of Pennsylvania.

In *Carson vs. Murray and others*, (3 *Paige*, 483,) Chancellor Walworth said, that it had long since become the settled law of England, that a valid agreement for an immediate separation between a husband and wife, and for a separate allowance for her support, may be made through the medium of a trustee; and that, as many of the decisions which had gone the greatest length on this subject, took place previous to the revolution, they had been recognized in New York, as settling the law to that extent—citing *Baker vs. Barney*, 8 *Johns. R.* 73. *Shelthar vs. Gregory*, 2 *Wend. R.* 422. 2 *Raithby's Index*, 386, n. 1.

In *Nichols vs. Palmer*, (5 *Day's R.* 47,) the question was distinctly presented to the Supreme Court of Connecticut, upon articles of separation, by which the husband bound himself to sup-

port the wife "forever hereafter," and the legality of such provision was fully sustained.

"It is objected to the declaration," says Justice *Baldwin*, "that it exhibits a contract depending for its basis, on an agreement between husband and wife, to part and live separate. It is contended, that such an agreement cannot be recognized as of any validity, because sound principles of policy forbid it, as *contra bonos mores*, and that of course all contracts engrafted upon such a stock, must also be void: I admit the contract between husband and wife, simply, cannot be enforced; yet, where such agreements are executed by the intervention of a trustee, I contend that the contract with the trustee is not necessarily void. The doctrine of separate maintenance, by the aid of a trustee, is found in the earliest records of English jurisprudence. Such contracts have, for ages, been protected and enforced in the English Courts of Chancery; and when collaterally brought in question, in Courts of Law, they have been recognized as the basis of legal adjudications."

We deem it unnecessary to pursue this investigation any farther. To vindicate the policy of the law, is no part of the office of Courts. If it were, we should find it difficult, we confess, to show that the law, in this respect, has acted with that true wisdom and real humanity, that regards the general interests of mankind.

For myself, I am inclined to believe, that policy and morality, if not religion itself, stand opposed to these voluntary separations; yet, finding as I do, that they have received the uniform sanction of the British tribunals, from the earliest period of their jurisprudence, and are a part of the ancient Common Law; that the doctrine was imported with our ancestors to this country, who have been in the habit of making similar arrangements, from the earliest period of our history, so far as we have any authentic information upon this subject; I feel that I am not at liberty to act upon my own opinion in the matter, but that the rule is binding upon the Judiciary, as a part of the Common Law of the land. It is for the Legislature to interpose, if they see fit to do so. If the late law which has been promulgated upon the subject of divorces, however, is to be considered as a true exponent of public opinion—and I doubt not it is—we need not expect any interposition from that quarter. Perhaps, if any individual case

would justify the application of such a principle, it would be the present.

Nay, more : it may be that the state of society in Great Britain and in this country, would justify a totally different policy respecting this principle. Here, a married woman very seldom abandons the most sacred of her duties, unless driven to it by necessity. Satisfied with simply filling the place that was intended for woman by nature, she will submit to the cruelty of her husband, notwithstanding the most ample cause may exist for leaving him. Practically, then, these settlements work beneficially here, for the weaker and more helpless party.

As we are not willing, however, to extend this doctrine beyond adjudged cases, we would state, that according to these, a deed of separation does not relieve the wife from any of the ordinary disabilities of coverture. *Marshall vs. Rutton*, 8 T. R. 645. Again, a deed of separation entered into by the husband and wife alone, without the intervention of a trustee, is void. *Legard vs. Johnson*, 3 Ves. 352, 359, 361. *Westmeath vs. Salisbury*, 5 Bligh. (N. H.) 375.

[2.] A deed containing a covenant for future separation, cannot be enforced. *Durant vs. Tilley*, 7 Price R. 677. *Hindley vs. Westmeath*, 6 B. & Cress, 200.

[3.] In case of a deed for an immediate separation, if the parties come together again, there is an end to it, both with respect to any future, as well as to the past separation. *Fletcher vs. Fletcher*, 2 Cox R. 99. 3 Bro. Ch. R. 619. *Bateman vs. Countess of Ross*, 1 Dow. R. 235.

[4.] It has been insisted, that as this case originated in the Court of Ordinary, and would fall properly under the jurisdiction of the Ecclesiastical Courts of England, it should be adjudged by the rule of that Court in relation to these averments. It will be observed, however, that that rule, as there administered, is based upon the jurisdiction which the Ecclesiastical Court possesses, to restore the parties to their marital rights, and to compel the performance of their conjugal duties. Not only is the Court of Ordinary here destitute of any such power, but we much doubt whether it exists any where else. In New York, and other States of the Union, where, as here, the Common Law has been adopted, this question has been determined by the doctrine maintained in the Common Law and Chancery Courts,

Chapman vs. Gray.

and not by the rule of the Ecclesiastical Courts. Besides, we have, in this State, a legislative expression of opinion; if we were in doubt as to what law should regulate our decision: As early as 1789, it was enacted, that should any case arise, which is not expressly provided for by the Act respecting intestates' estates, the same shall be referred to, and be determined by, the *Common Law*, as it had stood since the first settlement of the province. *Prince*, 225. Our forefathers never failed, on all suitable occasions, to manifest their preference for the Common Law proper of the mother country, over the Canon and Civil Law.

[5.] It is further argued, that although these articles may be good, as to the provision for life, made for the wife, inasmuch as the husband was bound to support her any how, that still the power of appointment, or of testamentary disposition, is void.

We do not see very clearly upon what principle this contract can be sub-divided. One of the main inducements for upholding these agreements is, that by them, the parties may adjust, in a manner most convenient to themselves, the terms of separate maintenance, which the law makes it obligatory upon the husband to allow. Here, the stipulation for this purpose is an entirety, and such as the parties themselves were satisfied with—due regard being had to their condition and circumstances in life. The wife was content, perhaps, to take less, *in presenti*, with this power of final and future disposition. She could certainly afford to do so. Her present enjoyment might very much depend upon this testamentary right. A wife may, by the consent of her husband, make a will of chattels; and this consent is here founded upon an agreement which the law deems valid.

In the case referred to in Ohio, the husband, for the maintenance of the wife, was to allow her one-half of his personal property, and \$1000 in money. He transferred and delivered over to the trustee, one-half of the personal property; also, sundry evidences of debt, amounting to about \$300, and for the balance of the one thousand dollars, gave two notes, for \$350 each. The wife died before the last note fell due, and the husband resisted its payment, on the ground, that the property which he turned over, together with the cash collected on the papers, was more than sufficient for the use and support of the wife, during the time that she lived, and that the consideration of the note had wholly failed.

But the Court say, "This contract is not a contract to pay, from time to time, as the payments may be wanted for the sustenance of the wife. Had the wife lived fifty years, the husband was under no obligation to pay more; and if she lived but one year, shall he pay less? We think not. The contract was obligatory, and he must abide by it. This is a contract between individuals, who acquire rights as against each other, which the law will enforce, by compelling each to do what they have agreed to do."

We consider the case of *Compton vs. Allison*, 1 H. Black. R. 324, as a direct authority upon this point. There, a married woman was living apart from her husband, under articles of separation, by which he covenanted that she should enjoy, to her own use, all such estates, both real and personal, as should come to her during the coverture, and that he would join in the necessary conveyances to limit them to such uses as she should appoint. This stipulation was held to be good.

If these views be correct, it cannot be readily perceived how any objection can exist to the provision, in the articles conferring upon Mrs. Chapman the power of appointment over this property.

Our conclusion, then, is, that there is no error in the ruling of the Circuit Court, and that the judgment must be affirmed.

No. 59.—WILLIAM H. CARTER and wife, plaintiffs in error, vs. JOHN COLEBY, defendant.

[1.] A judgment, dormant by the Act of 1823, in favor of a ward against her guardian, with the entry of *nulla bona* on the execution issued thereon, made before such judgment became dormant, is admissible to prove a *constavit*, in an action by the ward against the securities of the guardian.

In Equity, in Greene Superior Court. Decided by Judge JOHNSON, March Term, 1856.

This was an action against John Coleby, as one of the sureties

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on a bond given by William G. Grimes, as guardian of Sarah T. Jones, wife of plaintiff in error.

Upon the trial, the plaintiffs offered in evidence the record of a judgment and decree against the guardian, and the execution issued thereon, on which there appeared an entry of "*nulla bona*" by the Sheriff, for the purpose of showing a *devastavit* by the guardian. The defendant objected to the testimony, on the ground, that no entry had been made on the execution since the year 1834, and that the same was, under the Act of 1823, dormant.

The Court sustained the objection, and rejected the evidence; and this point comes up for revision, on exceptions filed by plaintiffs.

COUNSEL, for plaintiff in error, cited—

Matthews on Pr. Ev. 375. *Smith's Ex'r. vs. Miller*, 14 Wend. 188. 2 *Reps. Const. Ct.* 617. 7 *Ga. Rep.* 393.

MERRIWETHER, for defendant, cited—

1 *Boutier*, 577, 725. 7 *Ga. Rep.* 36, 393. 2 *Kelly*, 252. 3 *Mauls & Scé.* 66. *Lofft.* 783. 1 *Term.* 44. 4 *Ib.* 790. *Curry vs. Piles*, ante 32.

By the Court.—NISBET, J. delivering the opinion.

[1.] The Act of 1823 is not intended for the benefit of judgment debtors; it is not a limitation act, except so far as other creditors and purchasers are concerned. It was intended for their benefit and protection, and the object is effected by extinguishing the lien, and incapacitating the judgment for enforcement. For all other purposes, it remains unimpaired. It is the evidence of a debt, and an action can be sustained upon it. See *Lockwood vs. Barefield*, 7 *Ga. Rep.* 393. The decision that a dormant judgment is evidence of a debt due, is decisive of this case. The reasoning upon which that decision goes, may be seen by reference to the case referred to above, and need not be repeated here. This is an action brought by the ward, to charge the surerries of the guardian. The record of a judgment and execution, obtain-

ed by the ward against the guardian, dormant under the Act of 1823, and upon which execution is the Sheriff's return of *nulla bona*, made before the judgment became dormant, was tendered, to prove waste by the guardian, and rejected, as we think, improperly. The *devastavit*, in this case, consists in the refusal to pay to the ward her estate in his hands. To establish it, two things must be proven: 1. The claim or demand of the ward against the guardian. 2. His refusal or inability to pay it. The judgment establishes the first point. According to *Lockwood vs. Barefield*, it is *evidence of a debt due*. It is the highest evidence—record evidence—that the plaintiffs have a just demand against the guardian. Their claim has been ascertained in the most solemn form, to-wit, by judgment of a Court of competent jurisdiction. The pleadings, and the judgment thereon, also demonstrate the character of the claim, and the character in which the guardian was sued. The claim is for the estate of the ward, and he is sued in his representative character. Being still good, as evidence of a claim or debt due, the judgment establishes a debt due from the principal of this surety, as guardian, to the plaintiff; and that is the first thing to be proved in making out the waste.

The entry, by the Sheriff, of *nulla bona*, made when the judgment was unimpaired—before it had become dormant, under the Act of 1823—establishes the second thing to be proven, to-wit, the refusal or inability of the guardian to pay the demand. This entry was competent to prove this, before the judgment became dormant. It was then competent to prove that there were no goods of the defendant to be found, out of which to satisfy the judgment. How has it lost this competency? The judgment is not extinct—it is only dormant. It has lost its lien, and until revived, cannot be enforced. In all other particulars, it subsists. It subsists as evidence, and it subsists as upholding and continuing the legal operation of entries made upon the execution before it became dormant. The entry of *nulla bona* has the legal effect now, that it would have if the judgment was not dormant, because it was made at a time when the judgment was capable of enforcement—when a levy could have been made, if there had been property found—and when it was competent for the Sheriff to make it.

Let the judgment of the Court below be reversed.

NO. 50.—**WILLIAM P. HARDWICK**, plaintiff in error, *vs.* **JAMES S. HOOK**, receiver, &c. defendant.

[1.] The claimant, under our laws, being entitled to the custody of the property in dispute, may contract with third persons, as to the possession thereof; and such third persons will be answerable only to the claimant. But if the claimant be a *feme covert*, and incapable, by reason of such disability, of interposing any claim, coming wrongfully by the possession herself, she can confer no rights on others.

[2.] It is competent for Courts of Chancery to appoint a receiver to institute suits in his own name, for the recovery of assets belonging to the suitors in Equity; and being substituted in the place, such receiver is subrogated to all the rights of the real parties in interest.

[3.] A decree in Chancery is evidence, not merely of the fact of its rendition, but also of all the consequences resulting therefrom. It may be given in proof against persons who were not parties to the bill, in support of the plaintiff's right or title to sue.

[4.] It is no objection to a decree, that it was rendered by consent.

[5.] A naked trustee is a competent witness in an action to which he is not a party.

Assumpsit, &c. in Washington Superior Court. Tried before Judge Hovr, September Term, 1849.

Daniel Harris, as guardian, obtained judgment against Morris Walden to a large amount, and caused the same to be levied, in 1842, on a number of negro slaves in the possession of Walden. To a portion of these negroes, Sarah Walden, the wife of Morris Walden, by her next friend, L. Mathis, interposed a claim, that the same were her separate property, and gave a forthcoming and claim bonds, with William P. Hardwick as surety. The negroes, at that time, went into the possession of Hardwick, and remained in his possession until the termination of the litigation.

Before the claim issue was tried, Mrs. Walden, by her next friend, filed a bill, alleging the foregoing facts; and further, that her husband received this property in trust for her, and held it as trustee; but fearing she could not sustain her claim at Law, prayed that this property might be settled as a provision for her, and that the creditor, Harris, might be enjoined. Upon this bill, a decree was rendered, in 1846, settling one half of the property in dispute to Jephtha Brantley, in trust for Mrs. Walden, and provi-

ding that the other half be sold by James S. Hook, as receiver in Equity, and the proceeds paid to Harris, the creditor; and "that the said receiver in Equity proceed to collect, and if necessary, to sue for the hire of said slaves, that may have accrued or become due, by whomsoever, since the levy of the *fi. fa.* and divide the same" equally between Harris and Mrs. Walden, through her trustee.

Hook, the receiver, commenced an action of *assumpsit*, &c. against Hardwick, for the hire of the negroes, reciting in his petition the decree above stated. Upon the trial, counsel for Hardwick took exceptions to the action, on the ground of a want of privity between the parties. The exception was overruled by the Court, and this is the first error complained of.

Plaintiff below then offered, in evidence, the record of the bill and decree, which was objected to—

1st. Because, by the bill, the right to the hire is not vested in Hook, but he is a mere agent to sue in their names.

2d. Because Hardwick was not a party to the bill.

3rd. Because the decree showed that at the time Hardwick took possession of the property, Hook had no title thereto.

The Court overruled the objections, and this decision is alleged as error.

Jephtha Brantley was then offered as a witness, by Hook. Objection—that he was incompetent, being the trustee named in the decree for Mrs. Walden. The Court overruled the objection, and this decision is assigned as error.

The defendant below proposed to prove by one E. C. Williamson, a contract or agreement between Mrs. Walden and Hardwick, about the hire of the negroes, in September, 1842, after the bill in Equity had been filed. Objected to by counsel for Hook, and ruled out by the Court, and this decision is complained of as erroneous.

The defendant then proposed to prove by Isham H. Saffold, that Hardwick had paid him \$100, as the fee contracted by Mrs. Walden for the defence of the claim case, before the property went into the possession of Hardwick. On objection by plaintiff's counsel, the Court rejected the evidence, and this decision is assigned as error.

Defendant's counsel then proposed to prove by Charles J. Jenkins, that the decree in the Equity cause was made and drawn

by counsel, and submitted to be signed by the Jury, by consent. The Court rejected the evidence, and this decision is assigned as error.

Defendant's counsel requested the Court to charge the Jury—

1st. That from the decree under the bill, there is no evidence of title in the plaintiff, to authorize a recovery in this action.

2d. That if the Jury believed that Hardwick went into the possession of the negroes, under a contract with Mrs. Walden, if liable at all, he is liable to Mrs. Walden.

3d. That after the bill was filed, Hardwick could contract with Mrs. Walden, he being no party to the bill, especially if he had no notice of it.

The Court refused so to charge, but on the contrary, among other things, charged the Jury, that "In this case, the decree vests the legal title in Hook to the hire, and he has a right to recover all the hire in this suit, against Hardwick, from the time the Court of Equity took jurisdiction of the cause; that the legal title to the hire was separated by the decree from the legal title to the property, and vested in Hook; that if Mrs. Walden had been a *feme sole*, when the property went from the Sheriff to Hardwick, she would have had the right to contract about the possession, and would have been bound by it, but being a *feme covert*, she could make no contract to impair her rights after the Court of Equity took jurisdiction of the cause; that the hire must be governed by the decree."

All of which charge and refusal to charge, is assigned as error.

JOHNSTON and THOMAS, for plaintiff in error.

To maintain the action of assumpsit, a *promise*, express or implied, must be proved, and the contract must be proved to have been made *by* the defendant *with* the plaintiff, and him only. 1 *Saund. Pl. & Ev.* 109, 42. 4 *B. & A.* 437. 1 *East*, 497. 8 *T. R.* 332. *Brown on Actions at Law*, 328. 9 *C. & P.* 87.

The consideration must have proceeded from the plaintiff, and at the defendant's request, express or implied. 1 *Saund. Pl. & Ev.* 146. 1 *T. R.* 20. *Str.* 933. *Brown on Actions*, 328.

In all actions at Law, the plaintiff must be the one in whom the *legal right* was vested, at the time the cause of action arose.

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Brown on Actions, 99, 103. *Broom on Parties*, 1. 7 *T. R.* 50, 607. 2 *Bing.* 20. 8 *T. R.* 332. 3 *Camp*, 417.

A contract, being a mere chose in action, cannot be assigned, so as to allow the assignee to sue in his own name. He must use the assignor. *Brown on Actions*, 105, and authorities there cited.

Covenants do not run with personalty. *Broom on Parties*, 10. 13 *East*, 63. 10 *East*, 279.

A receiver is one appointed by the Court to provide for the safety of property *pending the litigation*—to take care of the *property in dispute*, and pay it over, and its profits, to the party eventually entitled. This was not a proper case nor a proper time for the appointment of a receiver. 1 *Smith's Ch. Pr.* 628, '9. 2 *Mudd. Ch. Pr.* *Bennett's Ch. Pr.* 89. 16 *Wend. R.* 405, 21. 3 *Daniel's Ch. Pr.*

A receiver cannot bring an action in his own name. When he sues, he sues by permission of the Court of Chancery, and sues in the name of the party having the legal right. 1 *Smith's Ch. Pr.* 639. 3 *Atk.* 750. 16 *Wend.* 410. 3 *Bro. C. C.* 86. 1 *Johns. Ch. R.* 60.

The rights of third parties, neither parties nor privies to a suit, cannot be affected by that suit.

The testimony of a trustee is not admissible in a suit for the benefit of the *cestui que trust*, because the fund is to be paid to him, and is subject to be retained for any balance due him from the *cestui que trust*, he being entitled to commissions.

C. J. JENKINS, for defendant.

The decree in Chancery, appointing Hook, (the plaintiff below,) receiver, vests in him a legal title to the hire of the slaves in contest, accruing *pendente lite*, and the defendant, Hardwick, is legally liable for it—hence the privity. 1 *Story's Equity*, §73. 2 *Story's Equity*, §§831, 833, 834. 8 *Paige's Chancery Reports*, §§565, 389. 2 *Roper on Husband and Wife*, 117, 118. 8 *Term Reports*, 547.

The record of the suit and decree in Chancery, was competent evidence, even against a stranger, to show title in the plaintiff below. 1 *Starkie's Evidence*, 212. 1 *Greenleaf's Evidence*, §538, '9.

A trustee, when not a party to the record, not liable for costs,

is a competent witness, though his *cestui que trust* may have an interest in the record. *Phillips' Evidence*, 41. *Norris Peake's Evidence*, 229. 1 *Greenleaf's Evidence*, §333. 1 *Douglass' Reports*, 140. 1 *P. Williams' Reports*, 289, 290. 1 *Modern Reports*, 107.

A decree in Chancery, having been put in evidence, simply to show plaintiff's legal right—to establish privity—not to fix defendant's liability—it was not competent for defendant to attack that decree collaterally, by proving that it was founded on consent between the parties.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Is Hardwick liable to pay hire to *any* body for the negroes which were in his possession? Had he got the custody of them from one capable, in Law, of giving it—as all lawful claimants, we apprehend, are—then, most clearly, he would have been responsible to no one else; and might, as he seeks to do in this case, have protected himself from hire, by contract with the claimant. But Mrs. Walden, being a *feme covert*, was incapable, in Law, of interposing any claim. She herself acquired the possession of these slaves wrongfully. The Sheriff had no right to give it to her; and, consequently, she could confer no right, by contract or otherwise, upon the defendant, Hardwick. He is, therefore, liable for hire to the rightful owner of the property, upon an implied assumpsit.

[2.] Is Hook, the plaintiff, entitled to sue for and recover this hire, as receiver? We see no reason why he may not. The power is expressly conferred upon him by the decree; and it is competent for a Court of Chancery to delegate such authority. It is the every-day practice to do so. When appointed, his right relates back to the commencement of his principal's title. Being substituted in the place, he is subrogated to all the rights of the true owners of the property.

[3.] But it is said that Hardwick was not a party to the bill, and that therefore the decree was inadmissible against him—that it was *res inter alios acta*. Judgments and decrees are not only evidence of the fact of their rendition, but of all the legal consequences resulting from that fact, whosoever may be the parties to the suit in which it is offered in evidence. The record may be

introduced where it constitutes one of the muniments of the party's title to an estate, as where a deed was made under a decree in Chancery. *Barr vs. Gratz*, 4 *Wheaton*, 213. So, here it is competent, by the decree, to establish the plaintiff's right, as receiver, to maintain this action. The defendant is not affected by it. He is entitled to every defence which he might have had, had the action been brought by Harris, the creditor, and Brantley, the trustee of Mrs. Walden.

[4.] Nor was it error in the Court to refuse to allow Mr. Jenkins to testify that the decree in the bill, filed to protect the wife's equity, was rendered by consent. This would, in no wise, affect its validity, even if it could be attacked in this collateral way. The parties to the proceeding had a right to compromise their controversy; and why should third persons object, provided they are not prejudiced by it? Indeed, so far from there being anything wrong in this, I had looked upon it as a duty to "agree with our adversary, while in the way with him."

The Court, too, was right in rejecting all testimony which was offered, either for the purpose of proving a contract between Hardwick and Mrs. Walden, exempting him from the payment of hire, or the expenditure of money, on her account, to attorneys and others. We repeat, that as a married woman, she was incapable of contracting in relation to this property, ~~is not~~ having been at that time settled to her separate use. And whatever claim Mr. Hardwick may have in Equity, against the trustee of Mrs. Walden, (and that he is entitled to relief, I will not deny,) still, he cannot plead them, either by way of payment, or set-off to an action at Law, brought against him for the undivided hire of the negroes, while the title was joint, and before they were distributed between the wife and the creditor of her husband.

[5.] There is one other decision excepted to, and that is the ruling of the Court, that Brantley, the trustee, under the decree of Mrs. Walden, was competent to prove the hire received by Hardwick. To disqualify a witness, on the ground of interest, it must be fixed and certain, and not remote and contingent. 10 *Johns. R.* 21. 1 *Id.* 491. 3 *Dall.* 508. 2 *Tyler*, 399. 1 *Term. Rep.* 163. 5 *Johns. Rep.* 256. And Mr. Phillips, in his *Treatise on Evidence*, (1 volume; 40,) remarks, that "it may be laid down as a general rule, that executors in trust, trustees and agents are

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not incompetent, merely on the ground of their liability to action."

It never was held that a naked trust would exclude one from being a witness. *Willis on Trustees*, 227, and cases cited. If he were a party to the record, in a Court of Law, the rule would be otherwise; but in Equity, he might even then be examined as a witness, by leave of the Court, which is granted in such cases, as a matter of course. *Marr vs. Ward*, 2 *Atk. Rep.* 228.

Here Brantley, as trustee, was no party to this suit. He is not responsible for cost, nor the result, nor the expense of carrying it on. He is neither the real nor the nominal party. There is nothing then to disqualify him, and we are of opinion that his testimony was rightfully received.

No. 61.—THE STATE OF GEORGIA, *ex rel.* JOHN H. LOW, plaintiff in error, vs. GEORGE W. TOWNS, Governor, &c. of the State of Georgia, defendant.

- [1.] Where two individuals claim the right to the office of Clerk of the Court of Ordinary, and one of them obtains a commission from the Governor, it is competent for the Judiciary to go behind the commission, and to inquire into the validity of the election, and decide the rights of the contesting parties, notwithstanding the Governor may have issued a commission to one of them, from the evidence before him.
- [2.] The issuing a commission by the Governor to such Clerk, is merely a ministerial act, required by law, and not a duty enjoined by the Constitution, and is, therefore, only *prima facie* evidence of title to the office, and not conclusive.
- [3.] However clear it may be, as a general legal proposition, that when a mere ministerial act is required to be performed, by law, on the part of an executive officer, and individual rights depend on the performance of that act, that the proper tribunals of the country have jurisdiction to compel its performance; yet, for political reasons alone, the Chief Magistrate of the State cannot be compelled, by *writ*, to perform such ministerial act.
- [4.] When the relator, applying for a *writ* against the Governor, to issue to him a commission as Clerk of the Court of Ordinary, had failed to

establish his title to the office, by the judgment of a Court of competent jurisdiction: *Held*, that the Court had no jurisdiction, according to the relator's own showing, to award the *mandamus nisi* against the Governor.

Application for a *mandamus absolute*. Decided by Judge Johnson, 22d March, 1850.

This was an application for a *mandamus* to compel the Governor to issue a commission to the relator, John H. Low, as Clerk of the Court of Ordinary of Henry County. The petition for a *mandamus nisi* set forth the following facts:

On the second Monday in January, 1847, John H. Low was elected Clerk of the Court of Ordinary of Henry County, and was duly commissioned and qualified. On the first Monday in January, 1849, Peter Z. Ward and four others were elected Justices of the Inferior Court of Henry County. On the second Monday in January, 1849, before the Justices elect were commissioned and qualified, Columbus W. Smith and two others, being a majority of the Justices of the old Court, re-elected Low Clerk for the next ensuing two years, and transmitted the certificate of his election to the Governor, as required by law. Garry Grice, one of the old Court, without any authority from the Governor, on the same day proceeded to swear in two members of the new Court. After the election of Low—but on the same day—the new Court, without Clerk, Sheriff or record, proceeded to and elected one James Pyron Clerk of the Court of Ordinary for the next two years, and fraudulently transmitted a certificate of his election to the Governor, who soon thereafter issued a commission to James Pyron. At the April Term, 1849, of Henry Superior Court, an information, in the nature of a writ of *quo warranto*, upon the relation of John H. Low, issued against James Pyron, to inquire as to the authority by which he exercised the said office; and after hearing his return thereto, a judgment of *ouster* was granted, removing Pyron from the said office, which judgment was unreversed and unappealed from. After this judgment, Low again applied to the Governor for a commission, who refused to issue a commission to him. In consequence of which refusal, the new Court again appointed Pyron Clerk, which appointment was recognized by the Governor.

The petition farther stated, that the judgment of *ouster* had

been officially communicated to the Governor, and he requested and required to commission Low, which he had refused to do.

On this petition, Judge *Johnson*, on the 18th December, 1849, granted a *mandamus nisi*, requiring the Governor to show cause, on the fourth Monday in February, 1850, why he should not issue a commission to the petitioner.

In response, Gov. *Towns*, "to manifest his respect for the judicial department of the State Government," and "without thereby, in any degree, acknowledging the jurisdiction of the Court over him, as the Executive, by *mandamus*, or waiving by his response, any power or right conferred to him by the people, under the State Constitution," "submitted the following considerations and reasons why the Court should not take farther cognizance of the case made upon the relation of John H. Low :

"1st. Because, as Governor of the State, deriving his powers from the Constitution thereof, he has been made a co-ordinate, separate, distinct and independent department of the Government; and as the Executive Magistrate, filling said department, he is not subject, in the discharge of any duty, or the exercise of any power within the range of his department, to the mandate of the Judiciary, but is amenable, alone, for a failure, or omission, or refusal to execute an Act of the Legislature, to the people of Georgia.

"2d. Because, by no just interpretation of the Constitution of Georgia, can a separate, distinct, co-ordinate and co-equal officer be made a subordinate and ministerial officer; obliged, under the penalty of contempt, to obey the mandate or order of his co-equal and co-ordinate, in any manner, whatever, concerning his executive duties; and because, the Judiciary, having no such paramount power by the Constitution over the Executive, it can derive no right from the Legislature, so as to change or alter the distribution of powers and duties, as prescribed in the Constitution."

A third ground was taken in the response, denying that any judicial decision, establishing relator's right had been communicated to respondent, which was waived on the hearing.

The Court refused a *mandamus* absolute, on the ground that a writ of *mandamus* will not lie from the Superior Court against the Governor of the State of Georgia, to compel the performance

of an act which, as Governor, he is required by law to perform, and which he refuses to perform.

To this decision Low, by his counsel, excepted, and alleges the same to be erroneous.

Doyal & NOLAN and R. V. HARDEMAN, for plaintiff in error, cited—

Constitution of the State, art. 3, §7. Bonner vs. The State et al. Pitts, 7 Ga. Rep. 473. Kendall vs. The United States, 12 Peters, 610.

I. L. HARRIS and A. H. KENAN, for defendant in error.

Points made and authorities cited by IVERSON L. HARRIS, for defendant in error—

The writ of *mandamus* will not, in any case, lie to the Executive, but can be directed only to heads of departments, upon whom the Legislature have imposed ministerial duties not in conflict with their political duties to the Executive: *Marbury vs. Madison*, 1 *Cranch's Rep.* 137. *Case of Kendall*, 12 *Peters' R.* 610.

The maxim, that for every wrong there is a remedy, cannot, upon proper examination, be found to furnish the fountain of the power claimed. For its just interpretation, see *Broom's Legal Maxims*, pp. 43, 44, 80.

The other maxim, that a private inconvenience must be permitted to go unredressed, rather than a public inconvenience be created by the attempt to furnish a remedy, controls the first. *Broom's Legal Maxims*, p. 77.

That the writ of *mandamus*, in England, is an executive and not a judicial writ; though issuing out of the Queen's Bench it always runs in her name. 3 *Black. Conn.* 110. *Bacon's Abridg. title Mandamus. Ex parte Crane*, 5 *Peters' Reps.* 190.

In Georgia, the power to issue this writ is conferred on the Superior Courts, by the Constitution; yet the character of it is not in substance changed, nor has it acquired, by the constitutional delegation, any new force or larger extent of jurisdiction than it had in England. It goes in cases where it is necessary to carry out their judicial powers against precisely the same inferior

offices and jurisdictions embraced within its compulsive range in England. §7, art. 3, *Constitution of Georgia*.

Mandamus being an executive writ, would have belonged to the Superior Court as an incident to its general jurisdiction, without the express grant of it by the Constitution. *Adopting Statute, 1784, Prior's Dig. 570*.

A change in the forms of writs made necessary by the change of our form of Government, is only authorized by our Adopting Statute, so far as to mould them to suit similar departments and offices in this Government. Pursuing the spirit of that Act, and the analogies of law, the *mandamus* should always run in the name of "the Governor of Georgia." *Adopting Statute, 1784, P. 571*.

Mandamus will not lie against the Executive of Georgia. *Mumford vs. Whitaker*, decided by Judge Strong, in 1822. *William F. Johnson vs. Compton, Surveyor General*, decided by Judge Morrison, 1849.

It will not lie to compel the Governor to issue a commission. *2 vol. of Supplements to U. S. Digest, p. 354*—citing *Hawkins vs. Governor*. *Prior's Rep. 570*.

The executive, legislative and judiciary departments of government, declared to be separate, distinct, independent. Co-ordination and equality are fairly implied from that declaration. §1, art. 1, *Constitution of Georgia*.

The distribution of powers, and the limitations and restrictions as to the exercise of others, preclude the idea, that the paramount, supreme power asserted, is consonant with our form of Government. §1, art. 1, *Con. State of Georgia*.

All the powers of the Government, consisting of three classes, having been, by the Constitution, apportioned among the departments, it is insisted, that it is not within the competency of the Legislature to add to or abridge those conferred; nor can it, by a law imposing any duty, degrade the Executive from the equality given him by the Constitution. §1, art. 1, *Cons. Ga. Marbury vs. Madison*, 1 *Cranch*, 137.

The Judges of the Superior Courts having equal judicial power by the Constitution, it follows that one of them cannot be compelled, in a civil suit, to obey any writ issued by another, whether that writ be *mandamus* or *attachment*. See §1, art. 3, *Cons. of Ga.*

Members of the Legislature are exempt from arrest or imprisonment, in civil cases, during the time they are engaged in the business of legislation. §14, art. 1, Cons.

It is a necessary implication from the consideration of the functions of the Executive—the equality of rank with the other departments, and being entitled to the same privileges that they possess—that the Governor cannot be liable to arrest, imprisonment or detention, while he is in the discharge of the duties of his office, and for this purpose his person must be deemed to possess, at least in civil cases, an official inviolability. 3 Story's Com. on Constitution, 419.

By the Court.—WARNER, J. delivering the opinion.

This is an application on the part of John H. Low, the relator, for a *mandamus nisi* against Governor Towns, to show cause why he should not issue to him a commission as Clerk of the Court of Ordinary of Henry County.

It appears from the record, that Low, the relator, was elected Clerk of the Court of Ordinary of Henry County, in January, 1847, for the then ensuing two years; that in January, 1849, Low, the relator, claims to have been duly re-elected to the office by the old Court, for two years, and that James Pyron also claimed to have been duly elected to the same office, by the newly elected Justices of the Inferior Court, in January, 1849, for the ensuing two years. Both applicants for the office presented certificates of their election, to the Executive Department, and demanded a commission. The Governor issued a commission to Pyron, who was appointed by the new Court, and refused to commission Low, who was appointed by the old Court. Subsequently, a writ of *quo warranto* was filed in the Superior Court of Henry County against Pyron, and at the April Term of that Court, in the year 1849, judgment of ouster was rendered against Pyron, ousting him from the office of Clerk, on the ground that he was not elected according to law. At the October Term, 1849, of Henry Superior Court, another order was made by that Court, ordering the books and papers appertaining to the office of Clerk of the Court of Ordinary, to be turned over to the Clerk holding a commission issued in 1847; but there is no judgment of any Court, deciding that Low, the relator, was legally

elected to the office of Clerk, in January, 1849. The fact appearing on the face of the record, that the books and papers appertaining to the office were directed, by the judgment of the Superior Court, to be turned over to the Clerk holding a commission issued in 1847, clearly shows, that the validity of Low's election in January, 1849, was not determined by the Superior Court, but remained an *open question*. Such being the facts of the case, in December, 1849, application was made by Low, to the Judge of the Superior Court of the Ocmulgee Circuit, for a *mandamus nisi*, calling upon the Governor to show cause why he should not issue a commission to him, as the duly elected Clerk in January, 1849.

To this *mandamus nisi* the Governor responded, denying the jurisdiction of the Court to issue a *mandamus* against him, but does not admit the right or title of Low to the office which he claims.

[1.] In *Pitts vs. Bonner*, this Court held, that the issuing a commission to the Clerk appointed by the Court of Ordinary, by the Governor, as required by the Act of 1799, was a *ministerial* act, and that it was competent for the judiciary to go behind the commission, and to inquire into the validity of the election of the person so commissioned, at the instance of an individual whose rights might be prejudiced thereby. 7 Ga. Rep. 479.

The power of the judiciary to inquire as to the right or title of one, holding and exercising the duties of an office, under a commission from the Governor, has been gravely questioned, as being an unauthorized interference with the duties of the executive department of the government, and those high in authority have been made to feel "an *involuntary shudder*, as if at the near approach of grasping power, the judiciary was about to plant its iron heel upon a prostrate Constitution." With the most profound respect for the executive department of the government, we cannot assent to the proposition, that the mere *ministerial* act of the Governor, issuing a commission to an individual, shall be *conclusive* evidence of his right and title to the office which he claims under it, and that the Courts have no power or authority to look behind the commission, and adjudicate the rights of the parties claiming the office, under the Constitution and laws of the State. In this country, supreme power exists in the people alone, and they have created certain offices for *their own benefit*.

The Clerk of the Court of Ordinary derives his office from the Constitution and *the law*, not from the *prerogative* of the executive department of the government.

[2.] The tenure by which the office is held, does not depend upon the commission which the Governor may think proper to issue; that, it is true, may be *prima facie* evidence of his appointment; but suppose the certificate of appointment furnished the Governor had been forged, and the person commissioned by him had never, in fact, been appointed by the Court of Ordinary as its Clerk? Shall the *ex parte* proceeding of issuing a commission by the Governor, who has no power to summon a Jury to try questions of fact, or command the attendance of witnesses, be held *conclusive* as to the rights of the citizen, claimed under the laws of the land? The validity of the title to an office created by law, is a *judicial* question—one which it is not only the duty of the Courts to decide; but one which, in our judgment, it is the exclusive province of the judiciary department to determine, notwithstanding the Governor may have commissioned one of the claimants. The commissioning Clerks is no part of the duty enjoined by the Constitution on the executive department of the government; nor has the Executive any discretion as to who shall be appointed Clerk of the Court of Ordinary; all that the Governor is required to do, by the Act of 1799, is to *commission* the Clerk who shall be appointed by the Court of Ordinary. By the sixth section of the third article of the Constitution, the powers of a Court of Ordinary, or Register of Probates, are vested in the Inferior Courts of each County in this State, which Inferior Courts have the power to vest the care of the records and other proceedings thereon, in the Clerk or such other person as they may appoint. *Prince*, 911.

By the 1st section of the Act of 1799, the Courts of Ordinary in each county, are authorized to appoint their own Clerks, *who shall be commissioned by the Governor*. *Prince*, 231.

It will be perceived that the Clerk of the Court of Ordinary derives his right to the office, when appointed, not from the executive department of the government, but from the Constitution and the law. Deriving his title to the office from the Constitution and the laws of the people of the State, when appointed in accordance with the law, he acquires a *vested right* to all the benefits arising therefrom, which the laws of his country will pro-

test. To withhold from the Clerk, when legally appointed, his commission which the law entitles him to receive from the Governor, is not only a violation of the law, but of a vested legal right. When a contest arises between two individuals respecting that right, although one of the parties may derive his claim thereon, under a commission from the Governor, issued in accordance with his judgment, from the evidence before him, as to which of the contending parties was legally elected Clerk, the judicial tribunals of the State have the appropriate jurisdiction of the question, and may proceed, according to the course of the Common Law, and finally adjudicate the respective rights of the parties as to who was legally elected and entitled to the commission, under the law. This is a government of laws and not of men, and the judiciary department of the government is the legitimate and appropriate department to investigate and decide upon the vested rights of individuals, when acquired under the Constitution and laws of the land. If the executive officer of the government has the power and authority to vest the office of the Clerk of the Court of Ordinary in such person as he may choose to commission, then he has the power to repeal that part of the Constitution which declares, that "the *Inferior Court shall have power to vest the care of the records and other proceedings therein, in the Clerk or such other person as they may appoint.*" The power of appointing a Clerk, is vested, by the Constitution, in the Inferior Court, sitting as a Court of Ordinary, and all the Governor has to do with the appointment, is to commission the individual who shall be appointed according to law. The Statute expressly declares, that the individual appointed Clerk by the Court of Ordinary, *shall be commissioned by the Governor.* But it is said, the Clerk legally appointed to the office, may perform the duties of it, without a commission; that the commission is not absolutely necessary for him to enjoy the benefits accruing from the office. As a general rule, this may be true; but we apprehend, according to the peculiar provisions of our Statute of 1809, a commission is necessary, before the party elected Clerk can enter upon the discharge of his official duties. That Act declares, that Clerks of the Courts of Ordinary, (and other officers specified in the Act,) who are in office, shall perform all the duties of their respective offices, during the time intervening between the election and commissioning of their successors, with all

the responsibilities to which they were liable previous to said election. *Prince*, 177. This Act clearly contemplates, that the newly elected Clerk shall not enter upon the discharge of his official duties until he is *commissioned*.

The Clerk appointed by the Court of Ordinary, then, is, under the law, entitled to have a commission from the Governor. It is his right to have the commission, under the law, not only as the *evidence* of his appointment, but, as we have shown, it is necessary for him to have it, to enable him to *enter upon the discharge of his official duties*. We have shown that the judicial tribunals of the State have jurisdiction, in a contest between two individuals as to the right to the office of Clerk of the Court of Ordinary, to adjudicate that question, although one of them may derive his title to the office under a commission from the Governor. But suppose the appropriate tribunal had adjudicated the question, that Pyron was not elected to the office according to law, and vacated his commission, and that Low, the relator, was duly and legally elected the Clerk of the Court of Ordinary of Henry County, and that the decision of the Court had been duly certified to the Governor, and he should still refuse to commission him, is Low without any remedy for this acknowledged wrong? The proper judicial tribunal of his country, has established his right to the office, and his right to have the commission to which the law declares he is entitled. This question was partially considered by this Court, in *Bonner vs. Pitts*, and it is difficult to perceive, according to the general principles of the law, why it is that the citizen should have a *right*, and not have a *remedy* to enforce that right; especially where that right depends on the performance of a mere *ministerial* act, enjoined by the peremptory enactment of the law. "The very essence of civil liberty, (says Chief Justice Marshall, in *Marbury vs. Madison*, 1 *Cranck*, 145;) certainly consists in the right of every individual to claim the *protection of the laws*, whenever he receives an injury. One of the first duties of government is to afford *that protection*. In Great Britain, the King himself is sued in the respectful form of a petition, and *he never fails to comply with the judgment of his Court*."

Blackstone states it to be a general and indisputable rule, that where there is a *legal right*, there is also a *legal remedy*, by suit or action at law, whenever *that right is invaded*. 3 *Bl. Com.* 23.

If the Court has jurisdiction to decide the *question of right*, it would seem it ought to have jurisdiction to enforce *that right*; for, as *Blackstone* says, authority to try would be vain and idle, without an authority to redress; and the sentence of a Court would be contemptible, unless that Court had power to command the execution of it. 1 *Bl. Com.* 242.

In *Kendall vs. The United States*, Mr. Butler, the Attorney General, admitted in his argument, that if the President of the United States was required, by law, to perform an act merely *ministerial*, and necessary to the completion or enjoyment of the rights of individuals, he should be regarded, *quoad hoc*, not as an executive, but as a merely *ministerial* officer; and, therefore, liable to be directed and compelled to the performance of the act by *mandamus*, if Congress saw fit to give the jurisdiction. 12 *Peters*, 593.

In this State, the Judges of the Superior Courts have the power, expressly conferred by the Constitution, to issue writs of *mandamus*, &c. and all other writs which may be necessary for carrying their powers fully into effect. *Prince*, 911.

In *Kendall vs. The United States*, Mr. Justice Thompson, in delivering the judgment of the Court, remarks, "That it would be an alarming doctrine, that Congress cannot impose upon any executive officer, any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of, and are subject to the control of the law, and not to the direction of the President; and this is emphatically the case where the duty enjoined is of a mere *ministerial* character." 12 *Peters*, 610.

If it is competent for the Legislature to impose on the Governor the performance of a mere *ministerial* duty, to issue commissions to Clerks, appointed by the Court of Ordinary, it is difficult to perceive, upon *legal* principles, why he should not be held responsible for the due execution of that duty, and be regarded, *quoad hoc*, not as an executive, but as merely a *ministerial* officer. The issuing commissions to Clerks, is certainly not one of the duties confided to the executive department of the government, by the Constitution, but is merely a *ministerial* act required by the law.

In the case of *Ferguson vs. Earl of Kinnowel*, decided in the House of Lords, the distinction between a *judicial* and a *ministe-*

rial act was clearly recognized. In that case, Lord *Brougham*, after denying that the judicial officers of Courts of general jurisdiction, were answerable for acts done within the limits of their jurisdiction, for errors of judgment, however plain the miscarriage may be, and however injurious the consequences, used the following expressive words: "But where the law neither confers judicial power, nor any *discretion* at all, but requires certain things to be done, every body, whatever be its name, and whatever other functions of a judicial or of a discretionary nature it may have, is bound to obey; and with the exception of the Legislature and its branches, every body is liable for the consequences of disobedience." Lord *Campbell* said, in delivering his judgment in the same case, "Where there is a *ministerial* act to be done by persons who, on other occasions, act judicially, the refusal to do the ministerial act is equally actionable as if no judicial functions were, on any occasion, entrusted to them. There seems no reason why the refusal to do a *ministerial* act by a person who has certain *judicial* functions, should not subject him to an action, in the same manner as he is liable to an action for an act beyond his jurisdiction. The refusal to do the ministerial act, is as little within the scope of his functions as Judge, as the act where his jurisdiction is exceeded. In the act beyond his jurisdiction, he has ceased to be a Judge." The foregoing principles were affirmed by the House of Lords, without a dissenting voice. 9 *Clark & Finn's Rep.* 279.

Now, as to all matters confided to the judgment and discretion of the executive department of the government, by the Constitution—as the appointment to office to fill vacancies, to approve or disapprove bills enacted by the Legislature, and the like—the Courts have no jurisdiction to interfere with the exercise of that judgment or discretion; but the commissioning Clerks, is not a matter which has been delegated, by the Constitution, to the judgment or discretion of the executive officer of the government. The Legislature have enjoined upon him, by *law*, the performance of the *ministerial* duty to *issue commissions* to such Clerks as *shall be appointed by the Courts of Ordinary*, and the rights of the persons, so appointed, to enter upon the discharge of their official duties, is made to depend upon the performance of this ministerial act. If, as has already been remarked, it was competent for the Legislature to impose this ministerial duty of issuing

a commission to a Clerk, on the executive officer of the government, wholly independent of, and in addition to the other functions devolved upon that officer by the Constitution, why may he not, when the performance of this ministerial act, so required by law, is essential to the completion and enjoyment of individual rights, be considered, *quoad hoc*, not as an executive, but as a merely ministerial officer, and, therefore, liable to be directed and compelled to perform the act by *mandamus*?

[2.] Viewed as strictly a legal question, we cannot offer any satisfactory reason why he should not, according to the general principles of the law; and it was in this point of view alone, this question was considered by this Court, in *Bonner vs. Pitts*—indeed, no other view of it was presented for our consideration, on the argument of that case. But while we are unable to give a satisfactory legal reason why the remedy sought should be denied to the citizen, yet we are satisfied, that for political reasons alone, the remedy by *mandamus* ought not to be enforced against the chief executive officer of the State. The ultimate effect of this remedy, in case of refusal by the Governor to obey the laws of the land, would be to deprive the people of the State of the head of one of the departments of the government. This ministerial act, required by the law, is to be performed by the same officer who is, by the Constitution, placed at the head of one of the departments of the government, and is required, by the Constitution, to perform certain other duties, of which the people may not be deprived.

Whatever rights to the office the relator may have, and whatever remedy he may be entitled to by the law, for the enforcement of that right, as a general proposition; yet, for the political reasons just stated, it cannot be enforced against the Chief Magistrate of the State, by *mandamus*, if it shall be withheld from him. The framers of the Constitution, doubtless, never anticipated that the executive officer of the government, whose sworn duty it is to cause justice to be executed according to law, would ever refuse to comply with the law, when authoritatively adjudicated by the proper department of the government. In England, as we have already seen, when a right is claimed by the subject as against the Crown, the King is sued in the respectful form of a petition, and he never fails to comply with the judgment of his Court. 3 Bl. Com. 255. *Marbury vs. Madison*, 1 Cond. R.

U. S. 275. In the monarchical government of Great Britain, when the subject appeals to the Courts of Justice for his *legal rights*, as against the Crown, and the judgment is in favor of the subject, and against the right claimed by the Crown, the King does not feel, it would seem; "*an involuntary shudder, as if, at the near approach of grasping power, the judiciary was about to plant its iron heel upon a prostrate Constitution,*" but always manifests his respect for the laws of his kingdom, by invariably complying with the judgments of his Courts. Such being the established course of the executive department of the government in Great Britain, we cannot, and we will not presume, that the Chief Magistrate of a republican State would, for one moment, hesitate to issue a commission to the relator, when his right and title to the office shall be established by the *judgment of a Court of competent jurisdiction*. To presume that the executive officer of the government would withhold the commission from one who had been judicially declared, by a Court of competent jurisdiction, *legally elected* to the office, would be to say, in the language of this Court, in *Bonner vs. Pitts*, "that such officer was above the laws of the people; that he had the right to exercise *despotic power*, regardless of the laws of the people; and in the language of Chief Justice Marshall, at *his discretion*, sport away the vested rights of individuals, secured and protected by the *laws of the land*. This Court will never indulge such a presumption—respect for the laws of the country, and especially respect for a co-ordinate department of the government, utterly forbids the idea, that the vested rights of the citizen will not be entirely protected, according to law, by the chief executive officer of the State.

[4.] But the relator in this case has never had his right to the office adjudicated by any Court, and until he has done so, his right to a commission is not made apparent to the Governor; at least, by such evidence as was indicated by this Court in *Bonner vs. Pitts*. It is true, the question of the relator's *right to the office* was waived on the argument; but such waiver could not give to the Court jurisdiction, when it had none, by the allegations contained in the record. The first step to have been taken by the relator was, to have had his right to the office in question established by the judgment of a Court of competent jurisdiction. This not having been done, the Court had no jurisdiction.

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tion, according to the view taken of the matter by this Court in *Bonner vs. Pitts*. This Court will not establish the precedent for parties to come before it, even by *consent*, for the purpose of litigating a mere *abstract* question, when there are no *individual rights* involved. Had the relator established his right to the office, by the judgment of the Superior Court, we are bound to presume that the Governor would have issued to him a commission, in accordance with the law, as adjudicated by the proper tribunal—to presume otherwise, would be wanting in respect to that department of the government, whose sworn duty it is to see that the laws of the State are faithfully executed. There has not been any collision between the judicial and executive departments of the government, and there never can be any, so long as each department continues to perform its appropriate duties. The relator not having established his right to the office by the judgment of any Court, the Court below had no jurisdiction, according to the relator's own showing, to award the *mandamus nisi* against the Governor.

Let the judgment of the Court below, therefore, be affirmed.

No. 62.—ANDERSON RIDDLE and others, plaintiffs in error, vs. TEMPERANCE KELLUM and others, defendants in error.

[L.] A died and left an estate for life, in certain slaves, to his wife B, with remainder to C. B intermarried, after going into possession of the life estate, with D. B being still in life, D sold ten of the slaves, being the issue of those originally bequeathed, to E and F, and immediately afterwards, D, combining with E and F to defraud the remainder-man C, clandestinely removed these ten slaves without the limits of the State, and sold them: *Held*, that in such case, Equity would compel D, E and F, by bill *quia time*, to give bond in a sufficient penalty, with security, for the delivery of the negroes, and their increase, to C, at the termination of the life estate, and that, altogether regardless of the solvency or insolvency of D, E and F:

In Equity, in Washington Superior Court. Decision on demurrer, by Judge Holt, September Term, 1849.

The question, in this case, arose upon a demurrer to a bill filed by defendants in error, against the plaintiffs in error.

The bill charged, that by the last will of Jesse Jordan, certain negroes were bequeathed to his wife, Jincey Jordan, during her natural life, and at her death, remainder to the complainants; that subsequently Jincey Jordan intermarried with Anderson Riddle, who, confederating and combining with William C. Riddle and Eldridge Williamson, and intending to defeat and defraud the remainder-men, sold ten of the said negroes, being the increase, to these confederates, who, with a full knowledge of the title and the fraud, without ever taking the negroes home, by private and unfrequented ways, conveyed them to the Central Rail Road, and thus clandestinely conveyed them beyond the limits of the State; that they there sold them for the sum of \$8,000, having purchased them for the sum of \$2,000. The bill further charged, that Anderson Riddle, at the time of the sale, was in possession of a large property, independent of this property, and was unembarrassed and easy in his circumstances. There was no allegation that the defendants were insolvent, or likely to become so, nor that they were about removing without the jurisdiction of the Court.

The prayer was, that Riddle and his confederates "be decreed to pay over to the complainants the full present value of the said slaves, or such other sum as their actual interest in the slaves may be worth; or that they be decreed to enter into a penal bond for an adequate amount, with sufficient security, conditioned for the forthcoming of the slaves, and the issue and increase of the females, to be delivered at the death of the tenant for life, and for general relief."

To this bill, a demurrer was filed, on several grounds, two of which alone were brought up for the decision of this Court.

1st. That the bill did not make such a case as would authorize the interposition of a Court of Equity.

2d. That the complainants had an adequate Common Law remedy.

The Court below overruled the demurrer, and defendants excepted.

JAMES THOMAS, for plaintiff in error, cited—

1 Cowen's Justice, 310. 11 John. 136. 1 Hen. & Mus. 685.

Riddle and others vs. Kellum and others.

Law of Slavery, 190, 2 Day, 52. 7 Ga. Rep. 209. 2 Story's Eq. §§845, 845 a. 604.

JENKINS, for defendant, cited—

2 Story's Eq. §§843, '4, '5. Chit. Pl. 151, 139, 142, '3. 3 Peters' Rep. 210. 1 Story, §184. 4 Ga. Rep. 404. 4 John. Ch. 609.

By the Court.—NISBET, J. delivering the opinion.

If this proceeding be considered as instituted under the Act of 1830, it cannot be sustained. That Act relates to bills of *ne exeat*, and contemplates a remedy, in Chancery, for remainder-men and reversioners by that kind of bill. The Act of 1830 refers to cases where the tenant for life, being in possession or control of the property, apprehensions are entertained by the person its remainder, that it will be removed beyond the jurisdiction of the State, and that his rights therein will be impaired. In such cases, by that Act, upon making affidavit of such apprehensions, and of the value of the property, and of his right to it, the remainder-man is entitled to the writ of *ne exeat*; and Chancery will interpose with a preventive remedy, and restrain the tenant for life from removing the property beyond the limits of the State, or require bond and security that it shall be subject and accessible to the demand of the complainant.

[1.] This bill, by its averments, shows that the property is not in the possession or control of the tenant for life, and the requisite affidavits do not accompany it. But it is not a bill seeking the benefits of the Act of 1830—it does not make the case contemplated by that Statute. It goes upon a different ground of Equity—it makes a case independent of it—a case which will authorize the relief prayed for, on principles somewhat analagous to, but independent of those embodied in the Act of 1830. It goes upon principles, *quia timet*—it is a bill in its strongest phase, *quia timet*. The *ne exeat* is, in England, a prerogative writ—it is here a writ of right, and issues to restrain the defendant from departing the jurisdiction, or to require him to secure to the plaintiff his demand—it is in the nature of equitable bail—it is predicated upon the fear or apprehension that the debtor will remove out of the jurisdiction. Our Statute, as I have stated, gives to persons in

remainder the benefit of this writ. *Beames on Ne Excat*, p. 1. 1 *Black. Comm.* 137, 266. *Story's Equity Jurisp.* §§1465, 1466, '7, '8, '9. 1 *Johns. Ch. R.* 1. *Prince*, 469.

Bills quia timet are more extensively remedial than bills *ne exeat*. The latter are founded upon apprehensions of removal with the property, beyond the jurisdiction; whereas, the former are founded upon the waste, loss, deterioration or injury to personal property, in the hands of the party entitled to the present possession, or the danger of such waste, loss, deterioration or injury. Mr. *Story* says, "In all cases of this sort, where there is a future right of enjoyment of personal property, Courts of Equity will now interpose and grant relief upon a bill *quia timet*, where there is any danger of loss, or deterioration, or injury to it, in the hands of the party who is entitled to the present possession." *Story's Equity*, §845.

Where a specific legacy is given to one for life, and after his death, to another, the legatee in remainder is entitled to come into a Court of Equity, by *quia timet*, and have a decree for security from the tenant for life, for the due delivery over of the legacy to the remainder-man, upon *allegation and proof of waste, or of danger of waste of the property.* *Story's Equity*, §604. *Madair's Ch. Pr.* 176, 179. 1 *Ch. R.* 110. 2 *Freem. R.* 206. 1 *Bro. Ch. R.* 279. 3 *P. Williams*, 335, '6. *Covenhoven vs. Shuler*, 2 *Paige's R.* 122, 122.

The case made in this bill, falls under this rule. What is it? The bill alleges that Jordan, the testator, left certain negroes to his wife for life, with remainder to the complainants; that the tenant for life went into possession, and then intermarried with the defendant, Riddle; that Riddle sold ten of the negroes, being six of the slaves bequeathed, to his son and one Williamson, for \$8,000; that these negroes are worth \$8,000; that Riddle, Jr. and Williamson bought with knowledge of the complainant's title in remainder; that immediately upon this sale, the tenant for life, Riddle, confederating with the purchasers, Riddle, Jr. and Williamson, to defraud the complainants, and to defeat their title in remainder, clandestinely removed the negroes out of the State to *its unknown*, and sold them for the sum of \$8,000. The prayer that Riddle and his confederates be decreed to pay over to the complainants the full present value of the slaves, or such other sum as their actual interest in them may be worth; or that they

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be decreed to enter into a penal bond, for an adequate amount, with sufficient security, conditioned for the forthcoming of the slaves, and the issue and increase of the females, to be delivered at the death of the tenant for life—and for general relief. It is a case of the clearest equity, and demands the prompt interposition of the Equity powers of the Court. The fraud, as alleged, would give the Court jurisdiction. Unquestionably, coupled with that, the appropriation and removal out of the State, and actual sale of the entire property, life interest and remainder, will give jurisdiction. This is an *actual waste* of the estate—a destruction of the plaintiffs' remainder interest, for they are not to be presumed capable of finding these slaves at the expiration of the life estate, and successfully establishing their title in any one of all the foreign jurisdictions of the whole world, where they may chance then to be. And if they could, shall they be driven to that resort? Their right is, that the property remain within the jurisdiction, to await their title. If there is *danger* that it will not remain—will not be forthcoming to respond to their just demand, at the death of the tenant for life—they are entitled to the relief sought. And shall it be said, that when the waste has actually occurred—when the apprehension becomes reality—when the property has been fraudulently eloiigned and sold, and the tenant for life still in life, that the relief shall not be granted? If, in the former case, the Court has jurisdiction, for stronger reason, it has jurisdiction in the latter case. It does not depend upon the solvency or insolvency of the tenant for life, and his confederates. The remaindermen are entitled to be placed in that condition of security, which they would be in, if the property were within the jurisdiction. That the property remain to answer the title in remainder, irrespective of any other fact, is the right of the legatees in remainder. If that is violated, irrespective of any other thing, they are entitled to an equivalent security, by bond. So, we are very clear, that the Court below did not err in overruling the demurrer on the second ground taken in it.

But it is insisted that the Court ought to have sustained the demurrer on the first ground, to wit: that the plaintiffs in the bill have an adequate remedy at Law, and therefore, Chancery has no jurisdiction. From what has been already said, it is plain that they cannot have an ample remedy at Law. Although the title in remainder vests with the estate for life, yet the enjoyment and

possession of the property is postponed until the expiration of the life estate. The tenant for life is entitled to its use. She has an interest in it, which continues during her life. Now, we are not prepared to say, that in this case, an action in the case would not lie at once in favor of the complainants against these defendants, for their violation of the complainants' right of property in these slaves. Admit that it does, it is not an *adequate* remedy. What, in such a case, would be the criterion of damages? The value of the estate in remainder. The title in remainder gives to the complainants, at the termination of the life estate, the slaves and their issue. To determine the value of the estate in remainder, it would become necessary to ascertain the value of the property, at the death of the tenant for life. How could this be done by proof? The duration of the life estate is uncertain—the increase of the property is uncertain—the amount of its diminution, by death, and its value in the market at the death of tenant for life, uncertain. Any value to be now put upon the estate in remainder, by proof, would be either arbitrary or conjectural. The consequence is, that a recovery might be unjust to the complainants, being too small, or to the defendants, being too large. Again, how would it be possible to apportion, at Law, the interest of the tenant for life, being entitled to the use of the property during her life, and the interest of the remainder-men, being entitled to it, in fee at her death? The thing would be impossible. An action at Law, now, would be an inadequate remedy.

But it is said, that at the expiration of the life estate, the complainants would be entitled to recover the value of the estate, in an action at Law, and therefore, Chancery has no jurisdiction. I apprehend there is no doubt about the truth of the first part of this proposition; but the remedy at Law to oust the jurisdiction of Chancery, must not only be complete, but it must be prompt—it must be available *now*. The complainants are not to be told, that because they may have an ample remedy at some future day, they are now to be denied the relief which their case demands. They are not to be put upon the hazards (of insolvency of the defendants, for example,) to which their postponement would be incident. This doctrine would annul all the law of *quia timet* to be found in the books. To this point, see the case of *James Boyce's Executors, appellants, vs. Felix Grundy, appellee, 3 Peters, 210.*

So, we think the demurrer cannot be sustained upon either

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ground, and that the complainants are entitled to the penal bond, as prayed for.

Let the judgment of the Court below be affirmed.

No. 63.—THOMAS J. HEARD and another, propounders, &c.,
 plaintiffs in error, vs. JOHN A. HEARD and another, defendants.

[1.] After a bill of exceptions has been signed and certified by the Judge of the Superior Court and filed with the Clerk, his control over it is at an end.

[2.] Under the Acts of 23d February, 1850, the *original* bill of exceptions must remain in the Clerk's office below, for the inspection of all parties interested, and a *copy* be transmitted to the Supreme Court, as a part of the transcript of the record, or accompanying the same; and if this is not done, the cause will be stricken from the docket.

[3.] The Act of 23d February, 1850, allowing the copy of the bill of exceptions, with the transcript of the record, to be made out and sent up to the Supreme Court, on or before the first day of the term to which the writ of error is returnable, would seem virtually to repeal that provision of the Act of 1845, which requires the transcript to be sent up within ten days from the filing of the notice.

[4.] Where no other time is fixed for the operation of a Statute, it takes effect from its passage; and ignorance of the Act forms no *legal* excuse for its violation.

In error, from Elbert County.

A preliminary motion was made to dismiss the writ of error in this case, on the following grounds:

1st. Because no complete transcript of the entire record of the cause below, has been sent up and certified by the Clerk of the Superior Court, as required by the Act organizing this Court.

2d. Because there is no bill of exceptions, certified by the Clerk of the Superior Court to be the original bill of exceptions filed in his office and sent up by him to this Court.

3d. Because the presiding Judge, who certified the said bill of exceptions, being satisfied that the same was not true and consist-

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tent with what transpired on the trial of the cause before him, withdrew the said certificate, as appears by the order filed with the papers in this Court.

As to the first ground, the facts were, that the transcript did not contain a copy of the bill of exceptions, as required by the Act of 1850.

As to the second ground, the bill of exceptions had thereon the following entry :

"Filed in the Clerk's office of the Superior Court of Elbert County, and State of Georgia, this 24th day of April, 1850.

"WM. JOHNSTON, Clerk."

There was not the usual certificate, that this was the original bill of exceptions filed in his office, and the date of its transmission to the Supreme Court.

As to the third ground, the bill of exceptions was signed on April 22d. On 25th April, the presiding Judge granted at Olfambers an order directed to the Clerk, that he "do send no record of said case to the Supreme Court, nor said bill of exceptions; but said Clerk is hereby ordered to retain in his office said record, and to bring before me (the Judge) the bill of exceptions aforesaid, in order that the mistakes may be corrected."

Cons, for the motion.

Cons, contra.

By the Court.—LUMPKIN, J. delivering the opinion.

We shall consider only the first and third grounds taken in the motion.

[1.] Has the Judge of the Superior Court the right to arrest or otherwise interfere with the bill of exceptions, after it has been signed and certified by him, and filed with the Clerk? We think not. His duty is then performed, and his control over the bill of exceptions at an end. Any other construction would involve the Clerk in inextricable difficulty; for, should he fail or refuse to send up to this Court a complete transcript of the entire record, including a copy of the bill of exceptions, as required by law, he

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is liable to be attached and otherwise punished for his delinquency. The Legislature could not have intended to place this officer in a predicament, where he would be forced to decide, at his peril, between this conflict of jurisdictions, and, in any event, to be answerable to the one whose mandate he disobeyed.

We suppose, that when the presiding Judge has signed and certified the bill of exceptions, his power as well as duties in relation to the matter, are terminated; and, consequently, he must see to it, that the bill of exceptions, when presented, is true and consistent with what has transpired in the case before him.

That great injustice is sometimes done, both to the Court below and to the parties, by the bill of exceptions, we entertain no doubt; and the evil can only be obviated by the adoption of some practice by the Judges, to prevent surprise. Let it be required, for instance, that the exceptions be reduced to writing at the time they are taken, or that notice be given to the opposite party to appear, at a time and place stated, before the Judge who tried the cause, to suggest any alterations to the case as made out, so that the bill of exceptions, as prepared, and the amendments, may be mutually agreed upon, or corrected and settled, as the Judge shall deem consistent with the truth. I trust I shall be pardoned for making this suggestion—originating, as it does, in no spirit of dictation, but in an extreme solicitude to protect the Circuit Bench, as well as the rights of suitors.

[2.] On the other ground, this writ of error must be dismissed, namely: because there is, neither in the transcript of the record, nor accompanying it, a copy of the bill of exceptions, as required by the Acts of the last Legislature. The Acts, (for there are two of them upon this subject,) in substance declare, that the Clerk of the Superior Court shall, in all cases, retain the *original* bill of exceptions in his office, and on or before the first day of the Court to which the writ of error is returnable, send up a *copy* thereof, as a part of the transcript of the record, or accompanying the same. *Pamphlet Acts*, pp. 68, 141.

Here, no copy of the bill of exceptions is embodied in the transcript, in accordance with the provisions of one of these Statutes, nor accompanies it, in the terms of the other. But a document, purporting to be the *original* bill of exceptions, and which no doubt is, has been sent up, together with the other pa-

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pers, though not certified, as required to be, previous to the passage of the late law.

[3.] I would remark, in passing, that one of these Statutes, by allowing till the first day of the term to which the writ of error is made returnable, for making out and sending up to this Court the copy of the bill of exceptions, with the transcript of the record, would seem virtually to have repealed the provision in the Act of 1845, requiring the Clerk to make out and send up the transcript, within ten days from the filing of the notice of the signing of the bill of exceptions. It was probably so intended.

It is a substantial right, which belongs to the defendant in error, to have the original bill of exceptions remain where he can have access to it, that he may see what case has been made against him, and come to this Court prepared to meet it; and to deprive him of this privilege, by withdrawing the original papers from their proper depository, instead of transmitting a copy, here, as required by the Acts, makes it obligatory upon the Court to strike this cause from the docket.

[4.] The party complains that he had no notice of these Statutes. They were approved by the Governor, on the 23d of February—published in the gazettes of the State, by authority, on the 19th of March—and the bill of exceptions was not signed until the 22d day of April—two months after the passage of the Acts, and more than one subsequent to their publication. But, were it otherwise—had these Acts been passed the day before the bill of exceptions was tendered, there is no dispensing power in the Court, to relieve the citizen from the consequences of his ignorance, however unavoidable on his part. 1 *Gallison*, 62. In this case, from the Circuit Court in Massachusetts, the brig *Assa* was libelled and condemned for sailing from Newburyport on the 12th of January, 1808, contrary to the Act of Congress of the 9th of January, 1808, though it was admitted that the Act was not known in Newburyport on the day the vessel sailed. The Court admitted that the objection to the forfeiture of the brig was founded on the principles of good sense and natural equity, and that unless such time be allowed as would enable the party, with reasonable diligence, to ascertain the existence of the law, an innocent man might be punished in his person and property, for an act which was innocent, for aught he knew, or could by possibility have known, when he did it; still it held, that the rule was

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fixed beyond the power of judicial control, and that no time was allowed for the publication of a law before it operates, when the Statute itself gives no time.

In the case before us, no time is fixed in the Act; and the settled rule is, that it takes effect from its date. *Matthews vs. Gane*, 7 *Wheaton*, 104.

The English rule formerly was, that if no period was fixed by the Statute itself, it took effect from the first day of the session in which the Act was passed—a doctrine most absurd and flatly unjust. And yet this continued to be the law, until the 33 of *Geo. III*, which declared that Statutes are to have effect only from the time they received the royal assent. One of the elementary principles of municipal law is, that it be “*prescribed*.” All laws should, therefore, be made to commence *in futuro*, and be notified to the community a sufficient length of time before they go into operation; for, in this way alone can they properly be said to be *prescribed*. In New York, under their revised code, every law, unless a different time is specified, takes effect on the twentieth day after that of its final passage—in Massachusetts, on the thirtieth. But we doubt whether even this period is long enough for such a wide-spread territory as Georgia. By the law, as it now stands, that is, for the Statute to take effect, as most of our Acts do, from and immediately after their passage, a good deal of hardship and inconvenience has been experienced. By the Constitution of Mississippi, as declared in 1833, no Statute operates upon the persons or property of individuals, until sixty days after its enactment; and we would respectfully submit to our law-makers, whether it is reasonable or just that a shorter time be allowed in this State.

No. 64.—ALEXANDER KEMP, administrator, &c. plaintiff in error,
vs. ZECHARIAH DANIEL, *prochein ami*, &c. defendant.

[1.] Where B, by his last will and testament, bequeathed certain negroes to his daughter, as follows—"To my daughter, Celia Rosamond Powell, I give and bequeath, and to the heirs of her body, the following named negroes, &c. Should she have no heirs from her body, she is to have the use of said negroes her life-time, and, at her death, should she die without any heirs from her body, the four named negroes above, and their increase, to return to my son, John B. Bailey, as his property. It is my will that all my property be given up to my son, John B. Bailey, as his property, except the four negroes above mentioned, which are to be given up to Celia R. Powell": Held, that it was the intention of the testator, that his daughter should take a life estate in the negroes, and that her children should take an estate in remainder thereto, as purchasers, under the will; that the words, "heirs of the body," were intended to be used as words of purchase, and not as words of limitation.

In Equity, in Scriven Superior Court. Decision by Judge Holt, October Term, 1849.

By the last will of Bates Bailey, he desired that his wife and son, and all his property, should remain on his farm until the 1st of August, 1830—after which time, he bequeathed to his son all of his lands and negroes, &c. "except four negroes, which is here mentioned, to my daughter, Celia Rosamond Powell. I give and bequeath to the heirs of her body, the following named negroes, viz: Hannah, Alex. Screen and Dick. Should she have no heirs from her body, she is to have the use of said negroes her life-time, and, at her death, should she die without any heirs from her body, the four named negroes above, and their increase, to return to my son, John B. Bailey, as his property, or to his lawful heirs." It was further provided by the will, that at the date specified, all the property was "to be given up to John B. Bailey, as his property, except the four negroes mentioned above, which are to be given up to Celia R. Powell."

In September, 1848, Daniel, as next friend for the minor children of Celia R. Powell, filed a bill, praying a *re exeat*, on the ground, that under this will, Celia R. Powell took only a life estate, and her children in remainder.

On the hearing, a motion was made to dismiss the bill and pro-

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cess, on the ground that Mrs. Powell took a fee-simple under the will, and if only a life-estate, the remainder was to Bailey, and not to her children.

The Court overruled the motion, and this decision is brought up for review.

M. MARSH, for plaintiff in error, cited—

Ross vs. Steele, 2 *Simons*, 233. 1 *Hilliard on Real Estate*, 633. *Dubler vs. Trollope*, *Ambler*, 453. *Elton vs. Eason*, 19 *Ves.* 77. *Ham vs. Ham*, 1 *Dev. & Bat.* 598. *Carr vs. Porter*, 2 *McC.* Ch. 60. 2 *Dea.* 112. *Choice vs. Marshall*, 1 *Kelly*, 97. *Robinson vs. McDonald*, 2 *Kelly*, 120. 3 *Ib.* 563.

JNO. SCHLEY, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] The only question for our judgment, made by the record in this case, is the proper construction to be given to that clause of Bates Bailey's will, which relates to the bequest to his daughter, Celia Rosamond Powell:

The testator first directs that all his property shall be kept together, until the first of August, 1830.

After making a bequest to his son, John Bourbon Bailey, the testator made the following bequest: "To my daughter, Celia Rosamond Powell, I give and bequeath, and to the heirs of her body, the following named negroes, to-wit; Hannah, Alex, Screen, and Dick. Should she have no heirs from her body, she is to have the use of said negroes her life-time, and at her death, should she die without any heirs from her body, the four named negroes above, and their increase, to return to my son, John B. Bailey, as his property; or to his lawful heirs. It is my wish and will, that in the year and date above mentioned, for all my property, consisting of negroes—whether men, women, or children—horses, cattle, hogs, household and kitchen furniture, plantation utensils, all together, to be given up to my son, John B. Bailey, as his property, except the four negroes mentioned above, which are to be given up to Celia R. Powell."

What estate did Celia R. Powell take in the four negroes men-

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tioned in this clause of the testator's will? If we take the first part of the clause, and read it as follows—"To my daughter, Celia Rosamond Powell, I give and bequeath, and to the heirs of her body, the following named negroes"—without any regard to the superadded words employed by the testator, then, an estate tail is undoubtedly created, and the absolute estate to the negroes vested in Celia R. Powell, as was ruled by this Court in *Chdice vs. Marshall*; 1 *Kelly*, 97. Without any superadded words, explanatory of the intention of the testator, the words, "heirs of her body," would be held to be words of limitation, and not words of purchase.

But we think that the superadded words employed by the testator clearly show, that it was his intention that his daughter, Celia R. Powell, should take a life estate in the negroes, and that the words, "heirs of her body," were intended to be employed by him as synonymous with children.

If the contents of the will show that by the word "heirs," the testator meant other persons than next of kin, those persons will be entitled, and children may take under the word "heirs." 1 *Roper on Legacies*, 85, 86. 2 *Roper on Legacies*, 354. *Swain vs. Roscoe*, 3 *Iredell's Law Rep.* 200. Here, the testator's daughter is to have a life estate in the negroes, and at her death, should she die without any heirs from her body, the four named negroes and their increase, are given to John B. Bailey, the testator's son, a person then in life, which negatives the idea that the testator intended by the words, "heirs of her body," an indefinite failure of issue. Taking all the words employed by the testator in his will, as explanatory of his intention, it is our judgment, that Celia R. Powell took an estate for life in the negroes, with remainder to her children, as purchasers under the will; and in the event Celia R. Powell had died without children, then, upon the happening of that contingency, John B. Bailey would have been entitled to the property.

Let the judgment of the Court below be affirmed.

No. 65.—WILLIAM P. HALL and others, plaintiffs in error, vs. FARISH CARTER and MICHAEL J. KENAN, executors, &c. defendants in error.

- [1.] An executor is not, ordinarily, liable for *assets* which come to the hands of his co-executor, or responsible for his *devastavit*. If he is, however, active in the matter, and by his action, whether intentionally or not, enables his co-executor to commit a *devastavit*, he will be liable with him for it. Each executor has power, under the will, to execute it, and one has no power to prevent the other from taking possession of *assets*, or to take them out of his possession after he has acquired the possession.
- [2.] An inventory of notes and other *chose in action* is not, of itself, evidence of *assets* in hand, to charge an executor, but he will be liable for a *devastavit*, if he fails to collect such as are collectable, with due care and proper diligence.
- [3.] If two or more executors join in a receipt for money, they are, by weight of authority in England, thereby jointly liable. Query as to this rule in the United States.
- [4.] A distinction taken between a joint receipt and a joint return of an inventory.
- [5.] An inventory of *chose in action*, is a requirement of law, obligatory upon all the executors who qualify. It does not, of itself, show *assets* in the hands of either, so as to charge them, nor does it show a joint possession of the evidences of debt, but leaves the fact of actual possession and control in any one or all, open to proof.
- [6.] Held, therefore, that where there is a joint return of the inventory of debts, and the possession is in one, and he through negligence, without participation by the other, fails to collect them, he is solely liable for such *devastavit*.

Exceptions to an award, in Baldwin Superior Court. Decided by Judge JOHNSON, February Term, 1850.

The plaintiffs in error, as legatées under the will of George W. Murray, deceased, filed a bill against Farish Carter and Michael J. Kenan, the executors thereof, for an account and settlement. This cause, under a rule of the Court, was referred to the arbitrament of counsel named, by which rule the arbitrators, on request of either party, were required to reduce to writing any decision they might make upon any question of law; which decision might, by either party, be submitted to the judgment of the

Judge of the Superior Court, with leave to prosecute a writ of error thereto.

The arbitrators awarded against Michael J. Kenan, one of the executors, the sum of \$9,695 10, for *choses in action*, good and collectable at the death of testator, and lost by negligence and failure to collect, and not accounted for in his returns.

Under the rule, the arbitrators returned, in writing, their decision, that both the executors were not liable for this amount, but Kenan alone was liable. They farther returned, that the only evidence on which they made their decision, except that to be found in the pleadings and exhibits, was, that the *choses in action* were produced by Mr. Kenan, on the hearing before the arbitrators, as having been in his possession from the time of taking the inventory. The inventory was made jointly by the executors.

Kenan, by his answer, stated that he had the exclusive custody of the assets—the subject matter of this dispute—from the time of the making of the inventory, down to the time of the making of the award; and that the only assets in the hands of Carter, were turned over to him by Kenan.

Carter, in his answer, stated the same facts, and the manner in which he became possessed of any of the assets; also, that he knew nothing of the management of Kenan, except what he derived from his return.

On the motion to make the award the judgment of the Court, the plaintiffs in error excepted to this decision, on the ground that both executors were liable, jointly, for the amount thus charged against Kenan, individually.

The Court overruled the objection, and this decision is assigned as error.

CONC; counsel for plaintiffs in error, submitted the following—

1st. Executors are liable for the amount of inventories returned by them; and if they return none of the debts due the estate, as desperate or doubtful, they shall be charged with the whole as assets. *Graham vs. Davidson*, 2 Dev. & Batt. 155. *Wright vs. Wright*, 2 McCord's Ch. 196.

2d. If, by an agreement between two executors, one is to receive and intermeddle with such part of the estate, and another with such a part, each shall be answerable for the whole. *Monell*

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vs. Monell, 5 Johns. Ch. 294. *Ram, on Legal Assets*, ch. 38, §14, pp. 542, 544, 558. 2 *Williams on Executors*, 1119.

3d. Executors joining in receipts, are responsible, jointly, for the whole. *Johnson vs. Johnson*, 2 *Hill's Ch.* 277. *Leigh vs. Barry*, 3 *Atkyns*, 583, 584. 2 *Story's Eq.* §§1280, 1281.

4th. The main and important point—where two or more executors qualify, and the choses in action belonging to the estate are lost by negligence and failure to collect, the executors are all jointly responsible for the amount so lost by negligence and failure to collect. *Chambers vs. Manchin*, 7 *Vesey*, 198. *Brice vs. Stokes*, 11 *Vesey*, 325. *Muckloe vs. Tuller*, 1 *Jacobs*, 198. *Stiles vs. Guy*, *Law Mag.* 281. *Booth vs. Booth*, 1 *Beavan*, 125. *Doyle vs. Blake*, 2 *Schoales & Lefr.* 244. *Clark vs. Clark*, 8 *Paige*, 159. *Scully vs. Delany*, 2 *Irish Eq.* 165, cited 4 *Bar. & Harr. Dig.* 197. *Robinson vs. Harris*, 1 *Hayes & Jones*, 412, cited 4 *Bar. & Harr. Dig.* 194. *Williams vs. Mauland*, 1 *Iredell's Equity*, 92.

McDONALD, for defendants, submitted—

Joint inventory returned by executors, is not evidence of joint possession of the assets. 24 *Com. Law Rep.* 133. 2 *Williams' Executors*, 1404. *Ochiltree vs. Wright*, 1 *Dev. & Bat. Eq. Rep.* 336. *Southerland vs. Brush*, 7 *John. Ch. Rep.* 22.

A *devastavit* by one executor does not charge his companion. *Cameron et al. vs. The Justices, &c.* 1 *Kelly's Rep.* 36. 2 *Williams' Executors*, 1291. 1 *Peer Wms.* 81; last note. *Churchill et al. Ib.* 241 and note. 2 *Vesey, Jr.* 678, last note. 4 *Eq. Rep.* 71, 76. *Ib.* 92.

Negligence in collecting the assets is a *devastavit*. 2 *Wms. Executors*, 1284.

The actual possession and use, by one of two executors, is not, in law, the possession and use of both, so as to attach a liability on both. 2 *Wms. Exrs.* 685.

One executor has no authority to take from the possession of another, the assets of the testator, and cannot, therefore, be made liable for the default of that other. 1 *Dev. & Bat. Eq. R.* 336.

Executors stand on the same footing, having equal rights and the same responsibilities, are not liable to each other, and each is

liable to the *cestui que trust*, to the extent of the fund he receives. 14 *Peters' Rep.* 169. 11 *Johns. Rep.* 21.

One executor not liable for the *aches* of another; in not enforcing the collection of debts. 2 *Dev. Eq. Rep.* 51.

One executor not liable for the breach of trust of another, except in cases where the will creates an express trust, and he knew and acquiesces in the breach of trust. *Williams vs. Nison*, 2 *Beavan*, 472.

Executors and administrators are liable in Georgia, under the Statute and Common Law of England, as it existed in 1764. *Hotchkiss*, 476.

By the Court.—NISBET, J. delivering the opinion.

The Circuit Judge confirmed the award of the arbitrators, and from his judgment a writ of error is taken. The arbitrators held, as an inference of law, from the facts before them, that the executors of Murray, (Carter and Kenan,) are not jointly liable for the nine thousand dollars and upward, of *choses in action*, not collected, but that Kenan alone is liable. Whether their judgment of the law upon the facts be right, is the question for our determination. It is first important to state, definitely, what those facts are; for it will be seen that the rule of legal liability, in cases like this, depends upon slight variation in the facts. The bill of exceptions states, that no evidence was before the arbitrators, but that which is afforded in the pleadings and exhibits, except that the *choses in action*, for the failure to collect which Kenan was made liable, were produced to the arbitrators by Kenan, as having been in his possession from the date of the inventory. We are, therefore, to look to the pleadings and exhibits alone, for the facts, upon which the award was made, except the fact that Kenan produced the *choses in action*, and the farther fact, that they were produced by him as having been in his possession from the date of the inventory.

They are as follows: Carter and Kenan both qualified as executors to the will of George W. Murray. They jointly returned to the Ordinary an inventory of bonds, notes and other evidences of debt due the estate, among which, and constituting a part of which inventory, were the notes, &c. making up the amount of \$9,695 10, to the payment of which Kenan alone was found lia-

ble. These notes; &c. were proven before the arbitrators to have been collectable with reasonable diligence. They were exhibited to the arbitrators as wholly insolvent at the time of the award, and recognized by them as insolvent at that time. A part of the *choses in action* embraced in the inventory, as appears by Carter's answer and his returns, came into his possession, and he administered them, but no part of those upon which the award makes Kenan solely liable. The bill charges, generally, that the effects of the estate came into the possession of the two executors. In his answer responsive to the bill, Carter states, that the assets did not all come into his possession, nor did all come into the possession of his co-executor, Kenan, nor did all come into the possession of both jointly. It states farther, that such as came into his possession, he got from his co-executor, Kenan, or were attorney's receipts for papers placed with them for collection by the testator in his life, or by Kenan, after his death; and Col. Carter, in his answer, refers to his returns, as exhibiting the character and extent of his administration. Those returns were irregularly made, and do not show that any of the *choses in action* upon which Kenan was made liable, came into his possession. Kenan's returns are also irregularly made, and exhibit no action whatever upon those *choses in action*. Carter denies in his answer, any knowledge on his part of the manner in which Kenan managed the assets in his hands, except what he derived from Kenan's returns. In his answer, Kenan states, that the notes, &c. upon which the award charges him, were insolvent, and that they had been in his possession from the time of the inventory. Upon these facts, the arbitrators determined that Kenan alone was liable for *choses in action*, embraced in the joint return of the inventory, which were collectable, but which were not collected. The plaintiffs in error, excepting to the judgment of the Circuit Court, affirming the award of the arbitrators in this regard, insist that both the executors are liable. Before entering upon the question, it is proper to state farther, that the complainants claim as residuary legatees under the will of Murray, and that in relation to their interests in the estate, there is no special trust devolved upon the executors. The will appoints them, in the usual form, executors, and directs that the property not specifically bequeathed be sold, and the proceeds "be paid to them as fast as the

estate is settled." The trust clearly is no more than the ordinary trust devolved upon executors to a will.

[P.] An executor is not, under ordinary circumstances, responsible for assets which come to the hands of his co-executor. The trust created by the will is a several trust. The confidence reposed by the testator is several. One is as much entitled to execute the will, in the absence of any special trusts or specific directions, as the other; nor can one deny to the other participation in the administration of the estate. Legal capacity to execute is devolved upon each. From these propositions, the rule results; that one of two or more executors is not responsible for the *devastavit* of his co-executor. This is generally true; but if he intentionally or otherwise has contributed to the *devastavit*, he will be responsible. If he is active in the matter, and by his action, whether with intention to commit a *devastavit* or not, enables his co-executor to commit it, he will be liable with him. "I take it to be clear, (says Lord Thurlow, in *Sadler vs. Hobbs*,) that where, by any act or any agreement of the one party, money gets into the hands of his companion, whether a co-trustee or co-executor, they shall both be answerable." 3 Bro. Ch. C. 116, margin.

The rule is stated with more latitude by Mr. Williams, as derived from the authorities, thus: "Where, by any act done by one executor, any part of the representative estate comes to the hands of his co-executor, the former will be answerable for the latter, in the same manner that he would have been for a stranger whom he had entrusted to receive it." *Williams on Executors*, marg. p. 1294. Note to *Churchill vs. Hobson*, 1 P. Wms. 241. 11 Ves. 335. *Hardr.* 314. *Dick. R.* 356. 1 *Ross & M.* 66. *Stearns's Appeal*, 2 Penn. R. 419, 422. 2 *Hill's Ch. R.* 293. 4 *Rawl.* 157. 10 *Peters*, 532. 1 P. Wms. R. 81. 16 *Vesey*, 479, 480. 1 *Meriv.* 712. 1 *Sch. & Lefr.* 272. *Id.* 341. *Menell vs. Menell*, 5 Johns. Ch. 294, '5, '6.

The counsel admits the general rule, that under ordinary circumstances, one co-executor is not bound for the *devastavit* of his colleague; and I do not understand him to lay down the rule of exception to that general rule any stronger or broader than I have stated it. He contends, however, upon different grounds, that according to the case made in this record, Carter is liable for the *devastavit* of Kenan; and first, he insists that "executors are liable for the amount of inventories returned by them; and if they

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return none of the debts due to the estate as desperate or doubtful, they (both) shall be chargeable with the whole *as assets*."

[2.] The argument under this head, is drawn from the joint inventory returned by Kenan and Carter, and its weakness or strength depends upon the legal effect of the inventory. If it be true, that the joint inventory is, in law, an admission upon the records of the Ordinary, of assets in the possession and control of both the executors, then it may be conceded, that a failure to collect in the collectable *chooses in action* embraced in that inventory, is a joint *devastavit*, for which they are jointly liable. For, in that event, it would not relieve Carter, to show that the waste was the result of Kenan's neglect to collect, whilst he had the actual possession. If they are at first in the possession and control of both, each permits the sole possession and control of the other at his peril. In the prosecution of the argument, the learned counsel places this joint inventory upon the footing of a joint receipt for money, by two or more executors, and thus enlists in behalf of the conclusion to which he would conduct us, that large class of cases which have decided that co-executors are liable upon a joint receipt, when the loss of the money receipted for is the act of one only. The schedule of notes returned by a sole executor, without designating any part of it doubtful or desperate, was, at one time, evidence, *prima facie*, of liability for, the whole; and he would be put upon the necessity of showing, if such were the fact, that any part of them was not collectable in the use of (to use the language of our Act of 1767) "due care and proper diligence." This is the rule as to an inventory of assets other than debts; and, as stated, such *was* the rule as to inventories of debts. 1 Salk. 296. Buller's N. P. 140. S. C. Selwyn's N. P. 779, note, 6th edition. 8 Taunt. 734. 3 B. Moore, 69. Williams' Executors, 1401.

In *Giles vs. Dyson*, (1 Starkie's N. P. C. 32,) Lord Ellenborough would not allow an inventory of debts due to the estate, and which were not returned as desperate, to be considered as assets actually in the hands of the executor. His Lordship said, "you must prove, presumptively at least, that these debts have been paid—that presumption may depend upon time and other circumstances. But upon the plea of *plene administravit*, it is necessary to prove that effects came to the hands of the defendant. This is the universal practice." I apprehend that it is now settled, that

although debts due to the testator are assets, yet the executor or administrator is not to be chargeable with them till he has received the money. *Williams on Executors*, 1187. *Com. Dig. Assets*, d. *Bac. Ab. Exrs. h.* 1 *Camp*, 364. 1 *Salk*, 207. 14 *Johns. R.* 446. 4 *B. & Adol.* 657, *S. C.* 1 *Nesb. & M.* 434.

The English doctrine seems to be this, that an inventory of property is *prima facie* evidence to charge an executor; and an inventory of *choses in action* is not even *prima facie* evidence to charge him; but the proof must go farther, and show, presumptively at least, that the money has been collected. Such is the legal effect of the inventory, as evidence of assets in the hands of the executor. His liability for a *devastavit*, in not collecting *choses in action*, I am not now examining—my purpose being, at present, to enquire what effect is to be given to an inventory, as evidence that assets have come to the hands of the executor. There seems to have been in England two kinds of inventories. Formerly, it was necessary to exhibit an inventory of the estate to be administered before probate of the will, according to the practice of the Prerogative Court of Canterbury; and this practice yet obtains in some country jurisdictions. The Statute, 21 *Henry VIII*, requires an inventory, yet it seems that according to the modern practice in England, neither executors nor administrators exhibit any inventory, unless cited for that purpose in the Spiritual Courts, at the instance of a party interested. 1 *Phellim*, 240. *Toller*, 250. *Williams' Exrs.* 707, '8. It is, however, prudent for the executor or administrator to exhibit an inventory for his own protection. 1 *Hagg.* 106. I refer to these things for the purpose of saying, that in England, the effect of an inventory, returned *before* probate, is different from the effect of an inventory since the Statute of *Henry VIII*, upon citation. It is less in the former than in the latter case. The object of the inventory *before* probate, was to show the estate to be administered, for the protection of the executor, as well as for the benefit of all persons interested in the estate. That is the object of the inventory required by our Statute, and our inventory, I have no doubt, answers to the inventory formerly required in England, before probate; whereas, the inventory now required of the executor in England, upon citation, has its counterpart here, in those annual returns or inventories of his actings and doings, which the executor is, by law, required to make. The rule of evidence, there-

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fore, which is applicable to inventories here, is that which is in England applicable to inventories made before probate. In *Stearne vs. Mills, Deaman*, C. J. said, "I am of opinion, that the inventory, delivered by the executor, on proving the will, is not, in itself, evidence of assets having come to his hands." 4 *Barr. & Adol.* 655. 24 *Eng. Com. Law R.* 135.

The Statutes of Georgia, I believe, give no greater effect to the inventory of debts, than it has at Common Law. They are, indeed, confirmatory of the position, that the return, simply, of an inventory and schedule of debts, is not, of itself, evidence that assets have come to the hands of the executor. The Statute of 1764, by express words, makes the executor chargeable with "so much of the credits only, as he, she or they, after due care and proper diligence, shall recover and receive, in like manner as executors and administrators are made chargeable by the Common and Statute Law of England." *Priest*, 222.

This Statute requires an inventory to be made "of all and singular the rights and credits of the testator or intestate, whether the same be in ready money, judgments, bonds, or other specialties or notes of hand, together with a list or schedule of the books of account of such testator." For the purpose of showing what is to be administered—for the protection of the executor, and doubtless, also for the benefit of creditors, heirs and distributees, this perfect inventory is to be exhibited, not before probate of the will, as in England, but within three months after qualification. But how is he to be charged? Why, only with so much as he shall recover and receive, after due care and proper diligence. The law proscribes the rule of liability, as to choses in action—it ordains a criterion of liability; and that is recovery and receipt, after due care and proper diligence. Now, the inventory, as evidence, can go no farther than the liability settled by the law. It does not prove assets in hand—it does not prove recovery and receipt—it proves the receipt of the notes, bonds, book of accounts, &c. but not the money; and whilst, in one sense, they are assets, yet not assets in hand to charge the executor. They are evidences of debts due, which may or may not be collectable. By the Act of 1792, the inventory and appraisement of property is made evidence, but not conclusive, of the value of the estate. That may be shown to be more or less than the appraisement. *Priest*, 226.

For the purposes of this opinion, it is sufficient, if I have dem-

onstrated that the inventory of a *sole* executor is not conclusive of assets in hand, and therefore, of liability. What then is the effect of a *joint* inventory, where there are two executors? Admit it to be the same against both that it has against one, when there is but one, then, as we have seen, it does not prove that the assets have actually come to hand, and the argument of counsel, that Carter is liable, because simply, of the joint return, falls to the ground. The case does not stop with this joint return—far from it. But I have been endeavouring to meet the positions of the plaintiffs in error upon their own ground.

[3.] And I now enquire, what support the position taken by counsel on this joint inventory derives from its assumed analogy to a receipt signed by two executors. As to trustees, the rule is, that where they are authorized to receive money and jointly execute a receipt for it, they are, ordinarily, liable only for so much as each has received, and, ordinarily, it is different in case of executors. Trustees have equal interest and authority, and cannot act separately, as executors may, but must join in conveyances and receipts. They are obliged to join, for the sake of legal conformity. Justly, therefore, are they not liable, because of their joining. It is otherwise with executors.

They are not compellable to join in receipts. Each is competent to act. A receipt from one will be a valid discharge. If they join, therefore, in a receipt, it is a voluntary act, and is held an admission that they are jointly accountable. 2 *Fenbl. Eq. b. 2, ch. 7, §5. Fellows vs. Mitchell*, 1 P. Williams, 83, note 1. *Churchill vs. Hobson*, 1 *Ibid.*, 241, note 1. *Leigh vs. Barry*, 3 *Atk.* 584. *Ambler*, 219. *Murrell vs. Cox*, 2 *Vern.* 570. *Prec. in Ch.* 173. *Moses vs. Levy*, 3 *Younge & Coll.* 359, 367. *Sadler vs. Hobbs*, 2 *Bro. C. R.* 114. 3 *Ibid.*, 90. *Chambers vs. Minchin*, 7 *Vesey*, 198. *Brice vs. Stokes*, 11 *Vesey*, 324. *Joy vs. Campbell*, 1 *Sch. & Lef.* 341. *Doyle vs. Blakely*, 2 *Ibid.*, 242. *Hill on Trustees*, 312, 313. 2 *Story's Eq.* §§1280, 1281.

This rule, which charges executors upon a joint receipt, I concede, is established by the weight of authority in England; yet it has been questioned, and in fact modified there, by some of the ablest Judges of that empire. In *Churchill vs. Lady Hobson*, Lord Harcourt struggled against it. 1 *Pr. Wm.* 241. In *Westly vs. Clarke*, Lord Northington resisted it with convincing power. Among other things, he said, "If it appears plainly, that

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one of the executors only received and discharged the estate indebted, and assigned the security, and others joined afterwards without any reason, and without being in capacity to control their co-executor, either before or after the act was done, what grounds has any Court, in conscience, to charge him? Equity arises out of a modification of acts, where a very minute circumstance may make a case equitable or iniquitous; and although former authorities may, and ought to bind the determination of subsequent cases, in respect to rights—as, in the right of courtesy or dower—yet there can be no rule for the future determination of this Court concerning the acts of men." 1 *Eden. R.* 357. See, also, the opinion of Lord *Alvanly*, in *Hovey vs. Blakeman*, (4 *Vesey*, 607, '8.) In *Monell vs. Monell*, a greater Chancellor than either of these, (*Kent*.) reasoned against it, and one not less than he, (*Story*.) after declaring that it seemed to him difficult to maintain the sound policy, or practical convenience, or intrinsic equity of the rule, expresses himself farther, thus: "Perhaps the truest exposition of the principle, which ought, in justice, to regulate every case of this sort—whether it be the case of executors, guardians or trustees—is that which has been adopted by a learned Equity Judge in our own country. It is, that if two executors, guardians or trustees, join in a receipt for trust money, it is *prima facie*, although not absolutely conclusive evidence that the money came to the hands of both; but either of them may show, by satisfactory proof, that his joining in the receipt was necessary, or merely formal, and that the money was, in fact, all received by his companion." 5 *Johns. Ch. Rep.* 296. *Story's Eq.* §§1281, 1282, 1283.

[4.] But is the inventory of *chores in action* of the same force and effect as a receipt? From what has been already said, it is manifest that it is not. As evidence, I have attempted to show, that of itself, it does not prove assets in hand; but a receipt is a written acknowledgment of the receipt of money—that very thing which our Statute requires to be proven, in order to charge an executor. The liability of two executors upon a joint receipt, goes upon the idea, that it is equivalent to an admission of their willingness to be jointly accountable. The inventory cannot be construed into any such admission. It is but an official statement that such and such bonds, notes, books of account, &c. are found among the papers of the testator, as belonging to his estate. If

it admits any thing, it only admits the possession of the *evidences of debts*, whereas, the receipt admits the possession of *money* collected upon those evidences of debt.

[5.] But the utter dissimilarity in the instruments, and in the legal operation of them, is palpably manifest in this. The receipt is not required by law, but is voluntary; whereas, the inventory is required by law, and demanded by the oath of the executor, and, therefore, is not voluntary. The foundation upon which a joint liability upon a joint receipt rests, is, that the law does not require them to sign it jointly. One can give a discharge, and if both do sign, it is because both choose to sign. The cases which establish the rule admit, that in cases where a joint act is necessary by law, it does not apply—as in the case of the sale and transfer of property. *Hill on Trustees*, 313. *Terrell vs. Matthews*, 11 *Law Journ. N. S. Chanc.* 31. *Hovey vs. Blakeman*, 4 *Vesey*, 608. *Chambers vs. Minchin*, 7 *Vesey*, 197.

By the Act of 1764, it is declared, "That from and after the passing of this Act, *all and every* executor and administrator who shall, before the Ordinary of this province for the time being, or such person as he shall depute or appoint, (now the Inferior Court sitting as a Court of Ordinary,) qualify him, her or themselves for the administration of the estate of his, her or their testator or intestate, shall, upon oath, (the Act provides, then, for the production of the property, appraisement, and making a return to the Ordinary, and then proceeds,) together with a full and perfect inventory of all and singular, the rights and credits of the said testator or intestate, whether the same be in ready money, judgments, bonds or other specialties, or notes of hand, together with a list or schedule of the books of account of such testator." *Prince*, 222. By this law, the exhibition of the inventory is made the duty of *each and every executor who shall qualify*. All who qualify are bound by the law to return the inventory—there is no choice about it—and if one of two or more fails to make the return, he violates the law. In obedience to common sense and common reason, the usage is, as in this case, to make it jointly. The same thing is re-enacted by the Act of 1792. By this latter Act, the oath of the executor is prescribed, and he is required to swear, that he will make a true and perfect inventory of the goods and chattels of the estate: *Goods and chattels*, in the sense in which these words are used in this oath, I have no doubt, include

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chores in action. Thus, it is clear that all the executors who qualify, must join in returning an inventory. It is, therefore, clear, that so joining is not a voluntary act, and equally clear that there is, upon principle, a wide difference—indeed, no analogy—between a joint inventory and a joint receipt. The plaintiffs' case, of consequence, can derive no strength from the rule that holds co-executors equally liable upon a joint receipt.

As to the liability of co-executors upon a joint receipt, a distinction has been made between creditors and legatees, to the effect that they are liable to the former, but not to the latter. See 2 Fonblanque's Eq. p. 437, '38, 4th Am. edit. *Gibbs vs. Henning*, Prec. in Ch. 49. *Brice vs. Stokes*, 11 Vesey, 324. *Lord Shipbrook vs. Hinchinbrook*, 16 Vesey, 480. *Appeal of Brown's Exrs.* 1 Dall. 310.

The reason assigned for it is, that legatees are appointed by the testator, as well as executors, and cannot, therefore, impose the same responsibility on the executors as creditors. For myself, I see no good reason for the distinction. Lord *Thurlow*, in *Sadler vs. Hobbs*, calls it an *odd distinction*. That creditors have claims upon the estate, paramount to those of legatees, is true. No man can give any thing away until his debts are paid. Justice precedes generosity; and it is true, that legatees are the appointed beneficiaries of the testator, whilst creditors are rightful demandants under the law. The law protects the rights of creditors in the estate of their debtor; but how do these things affect the personal responsibility of the executor, or vary the character of his trust? The great equitable principle is, that the executor is to be responsible upon his acts, and according to the assets that come into his possession. The law declares the trust to be several—each has absolute power over the estate. How can these principles be dispensed with *at all*, so as to charge one for assets which his colleague has received? and if dispensed with in favor of creditors, why not in favor of legatees? It seems to me, that in a Court of Chancery, creditors and legatees, as to the personal liability of co-executors upon a joint receipt, stand upon the same platform. This distinction was not recognized by Chancellor *Kent*, in *Monell vs. Monell*, (6 J. C. R. 283,) and was expressly repudiated in South Carolina, in *Johnson vs. Johnson*, 2 Hill's C. R. 293.

If it be true, that a joint inventory will, of itself, charge both

executors, then in every instance any qualified executor becomes surety for his co-executor. The Statute requires all who qualify, to return the inventory—each must, by the mandate of the law, and by the moral constraint of his oath, exhibit the inventory, and when that is done, he, *ipso facto*, is liable; and there is no escape from this liability, but in a breach of duty as required by law, and a violation of moral obligation, as enjoined by oath.

Upon this view of the subject, what becomes of the right of the testator to select his executors? A solvent executor would not qualify with an insolvent one, however honest, and however high in the confidence of the testator; because, by so doing, he becomes his surety. The result would be, that a testator would be under a necessity of selecting only such men to execute his will, as he might be assured would be willing to be responsible for each other, or be limited to one executor. He must lose the services of his responsible friend, or of his trusted but irresponsible friend. The impolicy of this doctrine is apparent. It would, also, sweep from the books all the rules, so firmly established, which recognise the several character of executors' trusts, and which define and regulate their respective responsibility.

In *Stearne vs. Mills*, (4 Barn. & Adol. 655,) Mr. J. Parke speaks directly to this point, thus: "To say, generally, that the mere circumstance of having joined in an inventory, for the purpose of obtaining probate, renders an executor liable, would be going farther than is warranted by any authority."

In *Ochiltree vs. Wright*, one of the questions made was, whether one executor, consenting to a sale of property by his co-executor, and joining with him in signing an account and inventory of the sale, was liable for the *devastavit* of his co-executor. The Supreme Court of North Carolina held, that he was not liable under the circumstances of that case, and affirmed several of the propositions which I have stated relative to the legal character and effect of an inventory. Daniel, J. delivering the opinion of the Court, says: "The foregoing remarks, bring us to the inquiry whether, under the circumstances of this case, Wright, by his assent to the sale, and signing the inventory and account of sales, has made himself liable for that *devastavit*. The signing of the inventory could not have that effect, because executors are bound to render an inventory of all the assets which

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come to their possession or knowledge, because each has authority, by the will, to take possession of the property, and because Beck had already exercised that authority before the inventory was signed. It was but a formal proceeding, and by no means subjects Wright to the *devastavit* of his co-executor. Is there any additional responsibility thrown upon Wright by his assent to the sale by his co-executor, and signing the account of sales with him, to be returned to the County Court?" &c. 1 Dev. & Bat. Eq. 339, 340.

Our conclusion is, that the joint inventory of the *choses in action*, is a requirement of the law, obligatory upon both executors; that its office is to exhibit to the Ordinary the *choses in action* which belong to the estate, for the benefit of all parties in interest; that of itself it does not show assets in the hands of either of the executors, so as to charge them, without more. Nor does it prove a joint possession of the evidences of debt due to the testator, but leaves the actual possession in the one or the other, or in both, open to proof.

[6.] Having settled these principles, the application of them to the case is easy. The actual possession of the notes included in this inventory, upon which the arbitrators made Kenan liable, is conceded in the bill to have been proven to have been in Kenan, continuously from the return of the inventory to the making of the award. They were produced to the arbitrators by Kenan, as having been in his possession from the time when the inventory was returned. The answer of Kenan confirms these facts, and the answer of Carter and his returns deny that he ever had possession of them. The evidence farther is, that with proper care and diligence, these papers were collectable. There is no evidence that Carter, by any act of his, put these papers into the possession of Kenan, or contributed to his neglect in not collecting them. How stands the case, then? It is the case of a *devastavit* by negligence, committed by Kenan, in not collecting in *choses in action* which came to his hands, without participation or collusion on the part of his co-executor, Carter, and for which, according to well settled principles, he alone is liable. Such is our judgment, and the judgment of the Court below stands affirmed.

Respect, however, for the counsel who so ably advocated the cause of the plaintiffs in error, as well as the importance of the principles involved in other positions taken by him, make it the

duty of the Court to consider them. He draws a distinction between a positive *devastavit*, as where the money has been collected and converted to the use of the executor, and a negative *devastavit*, as where it consists, as in this case, in negligence and a failure to collect, and says, that "Where two or more executors qualify, and the *choses in action* belonging to the estate are lost by negligence and failure to collect, the executors are all jointly responsible for the amount so lost." A failure to collect in the money of an estate is a *devastavit*, if, by reasonable diligence, it can be collected. If this be true, and the farther proposition be true, that one executor is not liable, as a general rule, for the *devastavit* of his co-executor, it would seem to follow, that the position of the counsel cannot be a sound one. It does not seem to me, that upon the principles upon which each executor is made solely liable for his own *devastavit*, that the manner in which it occurs, whether negatively or positively, can make a difference. Having the power and right to take the assets in hand, irrespective of any power or right in his colleague, his liability is based upon his possession, and his act in the one case, and his possession and his omission of duty in the other. In either case, there is a breach of the confidence reposed in him by the testator, and the testator having misplaced his confidence in one, shall not operate to the prejudice of the other; that a failure to collect *choses in action* from negligence, which are collectable, is a *devastavit*. See 1 Madd. 298. 12 Mod. 573. 2 Bro. Ch. C. 156. 5 Vesey, 839. 11. Weind. 361. Williams on Executors, 1284.

If there is an agreement between executors, that each shall receive a certain portion of assets, and administer them, and they are lost, both have been held liable. Such a case would fall within the exception to the general rule. The agreement would be that kind of action on the part of the one, which would make him a participant in the *devastavit* of the other. 5 Johns. Ch. R. 294. Ram on Legal Assets, 542, '4, 558. 2 Williams' Executors, 1119. 2 Hill's Ch. R. 277. Hardres, §14. And as to such a case, the doctrine of the counsel would be true. But this is not such a case; for the record furnishes no evidence that there was any understanding or agreement to the effect stated.

Or, if it were agreed that the possession and control of the assets should be joint, the liability would be joint. If, for example, it were proven that two executors had placed the assets in a com-

mon depository, to which each should have equal access, and both should permit them to lie there until lost, both, I am satisfied, would be liable. But the evidence does not make that case. There is no proof of an agreement that the possession and control of these notes, and other choses, should be joint. Whilst it was admitted in the argument, that they did not come into the actual possession of Carter, it was contended that he had the control over them. The idea that he had the control, is conjectural—it is derived from the fact of a joint inventory. That, I have disposed of, from the fact that Carter does not, in his answer, deny that he had the control over them, and that he could have commanded the possession. But he does deny the possession, and states that the possession was in Kenan. In this denial and statement, he must be held to have denied control. As a joint control is not proven, the control must have been in the one or the other. The natural and the legal inference is, that the control accompanied the possession. Kenan had the possession; therefore, Kenan had the control. Or again, which is the most reasonable and the most logical to infer, that Kenan had the control, with the possession; or to infer that Carter had the control, without the possession? The former, clearly. It is argued, that as Carter did receive from Kenan some of the assets named in the schedule, he might have received, he had power to receive, those that were lost, and therefore, he is chargeable. Is not this a *nonsequitur*? What he did get from Kenan, we must infer, he got by his (Kenan's) consent. The delivery of some of the papers embraced in the inventory, by Kenan, to Carter, was voluntary. Does it follow that he would have consented, at Carter's instance, to deliver more or all? As it was at Kenan's option to deliver to Carter any at all, we conclude that those he did not deliver, he did not choose to deliver, and therefore, Carter did not get them. Legally, we infer that Kenan did withhold them from Carter, because it is true in law, that having possession, he would have become liable with Carter, if he had delivered them to him, and they had been lost. As to those that he did deliver to Carter, he is with him responsible. We cannot consent to charge Carter upon inferences like these. The proposition, then, of the counsel, must be considered as applicable to a case where choses in action have come to the possession of one of two executors. If it is true as to this case, one of two things is true in law: Either,

1st. Carter had the power, by virtue of his trust, under the will, to prevent Kenan from taking possession of these assets in the first instance, or

2dly. He had the power to call him to account, and to take the possession and control out of his hands, after he had taken the possession. If he had either of these powers, I concede that it was his duty, under the will, to exert them, to prevent a waste of the estate and a loss to the legatees; and failing to do so, he is chargeable. I apprehend that neither of these propositions is true. As before stated, the power of the executors over the assets is equal. That power has no regard to the solvency or insolvency of the executor, to his ability to manage them, or to his integrity as a man. It springs out of the will—it is by virtue of the confidence which the testator reposes in him. If he chooses to trust him, it is immaterial whether he has misplaced his confidence or not. If he be, in fact, unworthy of confidence, his co-executor is not necessarily to suffer. He is not compelled to qualify—he may disclaim. And if he does not, he is still safe, if he gives no aid or co-operation to a breach of the trust. The great equitable rule, that each is liable only for his acts, protects him. How, then, is it possible for him, consistently with these principles, to say to his colleague, you shall not take in hand these assets? If he can prevent him from taking into his possession a part, he can all; and thus it results, that one executor can defeat, altogether, all the powers of his associate—nullify his appointment, under the will, and prevent the confidence which the testator may rightfully repose. In *Douglass vs. Satterlee*, Kent, Ch. J. says, "It is also equally well settled, that each executor has the control of the estate, and may release, pay or transfer, without the agency of the other, and that executors and administrators stand on the same ground, and their powers and responsibilities in respect to each other are the same." 11 Johns. R. 16. See, also, *Edmonds et al. vs. Orenshaw*, 14 Peters, 169. *Jacomb vs. Harwood*, 2 Ves. 267.

The Master of the Rolls, in *Langford vs. Gascoyne*, says, "The rule in all cases is, that if an executor does any act by which money gets into the possession of another executor, the former is equally answerable with the other, not where an executor is merely passive by not obstructing the other in receiving it." 11 Vesey, 333. *Southerland vs. Brush*, 7 Johns. Ch. R. 22. *Harg-*

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thorpe vs. Melforth, Crow. Eliz. 318. Harrey vs. Blakeman, 4 Terey, 596.

In *Williams vs. Mailland*, Judge Gaston says, "One has as much authority to receive the assets as the other, and there is no obligation on either to prevent his companion from getting them into possession." 1 *Iredell's Eq. R.* 196.

- If these things are so generally, with what irresistible force do they not apply to a case like the present, where there is nothing in the evidence to show that when Kenan took possession of these choses in action, he was not trustworthy—nothing proven which was calculated to arouse the suspicions of Carter, that he would waste them or fail to collect them?

The same principles and the same reasonings deny to Carter the power to call Kenan to account, and to take these assets out of his hands after he acquired possession. It does not appear from the record, that he knew of Kenan's neglect. He denies that he knew any thing of his management of the estate, except what he learned from his returns. It is argued that he might have known, if he himself was in the proper discharge of his own duties; but it does not follow that a discharge of his duties, as required by the law, would make him cognizant of the defaults of his colleague. But suppose he was, however; it may be true, that it was a moral obligation to do all he could do to prevent a loss to the legatees, yet the law does not make him the supervisor of the conduct of his co-executor. It has not clothed him with power to compel him to do his duty. He cannot call him to account; and if he cannot, how iniquitous would it not be to hold him responsible, because he does not call him to account? The Supreme Court of the United States, in *Edmonds et al. vs. Orenshaw*, say, "Each executor has a right to receive the debts due to the estate, and discharge the debtors, but this rule does not apply as between the executors. They stand upon equal ground, having equal rights, and the same responsibilities. They are not liable to each other, but each is liable to the cestui que trust, to the full extent of the funds he receives." 14 *Peters*, 169.

Precisely the same point was made in the case of *Ochiltree vs. Wright*, before the Supreme Court of North Carolina, in regard to which that Court speaks as follows: "The true answer to this position may be given, almost in the words in which the opinion of this Court was expressed in the case of *Clarke et al. vs. Col-*

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ten et al. (2 Dev. Eq. R. 51.) Wright was, indeed, a curator or trustee for the plaintiff, but only for what was in his hands, or had been in his hands, or was under his power or control. Beck was a curator or trustee with precisely the same powers. If a misplaced confidence was placed in the latter, it was not the confidence of Wright, but of the testator. Wright did no act by which an abuse of that confidence was facilitated. *He had no authority to take out of Beck's hands the property of the cestui que trust, which was rightfully there; he never guaranteed the diligence, fidelity or solvency of his co-trustee, and there is no ground, in conscience, to make him answerable, when he has committed no fault and broken no engagement.*" 1 Dev. & Bat. Eq. R. 342.

See the case of *Clark et al. vs. Cotton et al.* (2 Dev. Eq. R. 51,) where the same question is considered, and the same views explicitly sustained.

Although this is the relation which one executor bears to his co-executor—although one cannot prevent assets from going into the hands of the other, and cannot take them out of his hands when there; yet legatees and distributees are not left to the tender mercies of a faithless or neglectful trustee. The law interposes for their protection. They can go into a Court of Chancery, and there compel him to account, and there receive that protection which the actual condition of the trust may require; and that they may know whether he is acting in good faith, or with proper care and diligence, he is required, by law, to make annual returns of the condition of the estate in his hands, which are open to their inspection. If he does make regular and full returns, they are thereby advised of the condition of the estate, and if he does not, the omission is a warning to them that something is wrong.

Not only so, but the Statutes of Georgia have made the Court of Ordinary the guardian of their interests. The Ordinary is the legally constituted supervisor of executors, administrators and guardians. The Ordinary can call them to account—it is their duty to do it; and they have power to provide for the faithful and efficient execution of their trusts, or revoke them. *Prince*, 232, 249, 245, '6. *Hotchkiss*, 476 to 479.

No. 66.—WILLIAM H. MALONE *alias* WILLIAM H. HALL, plaintiff
in error, vs. THE STATE OF GEORGIA, defendant.

[1.] The Act of 1805 changes the Act of 1799, only as to the mode of selecting *Grand Jurors*. Under both Acts, those remaining on the list, as made out from the tax books by the Clerk, constitute the *Petit Jury*, for the trial of civil and criminal causes, so that the Act of 1799 is, in fact, superseded, both as to *Grand* and *Petit Jurors*, by the Act of 1805.

[2.] Where a Juror has answered negatively both of the questions propounded by the Act of 1803, and been found competent by *trials*, who were not specially sworn for that purpose, and been accepted by the prisoner and sworn in chief, and the Court, to cure the irregularity, causes the Juror to be put again upon the prisoner, who objected on the ground that he had already been sworn in chief, and was thereby understood by the presiding Judge to insist on the Juror's sitting in the case: *Held*, That nothing had transpired in relation to this Juror, to constitute a good challenge for cause, and that if a good cause and waived, the consent cures the irregularity.

[3.] Where the evidence shows a concert of action between two parties, in relation to a homicide, the Court may, in its discretion, admit the acts and declarations of one accomplice to criminate the other, touching the common object; and such discretion will not be controlled by this Court, except in a case of manifest abuse.

Indictment for murder, in Greene Superior Court. Tried before Judge Johnson, March Term, 1850.

The issue in this cause was on a plea of "not guilty," of the plaintiff in error, to an indictment against plaintiff in error and John D. Malone *alias* Hall, for the murder of one Simeon Fuller.

When the State presented the panel of forty-eight Jurors, and was about to put the same upon the prisoner, the prisoner, by his counsel, challenged the array, on the ground "that John Oliver and twenty-one others of the panel, and who were on the regular panel of Jurors for said term of said Court, were not selected and sworn according to law, in this, that they were selected by a majority of the Justices of the Inferior Court, together with the Sheriff and Clerk, and by them sent up to the Judge of the Superior Court, and were by him deposited in the Jury box; and by the presiding Judge drawn therefrom, and summoned by the Sheriff of said County."

Which motion and challenge was refused by the Court, and defendant excepted.

Bernard Moore, one of the Jurors, being put upon the prisoner, and having answered in the negative the questions propounded under the Code, prisoner, by his counsel, required that he should be placed on trial before triors; whereupon, two Jurymen, previously sworn in chief, though not sworn as triors, acted as such, and found the Juror competent, who, not being challenged by the prisoner, was sworn in chief. Several other Jurors were placed upon the same triors and found competent, and challenged peremptorily by the prisoner. It being subsequently discovered, that the Jurors had not been sworn as triors, the Court directed the list to be re-called, beginning with the first one tried by the triors; and as each of those previously tried was called, prisoner challenged them for cause, on the ground that he had previously challenged them peremptorily. The Court allowed the challenge for cause. When Bernard Moore was called, the prisoner objected to his being placed upon him as a Juror, on the ground that he was already sworn in chief. The Court decided, that the Juror should try the cause, "the defendant not objecting at the time, and the Court considering the objection of prisoner as equivalent to insisting upon his acting as a Juror, inasmuch as he had expressed himself 'content' with the Juror, and he had been sworn in chief." To this decision defendant excepted.

The following are some of the material facts proven on the trial:

Simeon Fuller, the deceased, lived in Greene County, and about the 8th June, 1849, suddenly disappeared. John D. Hall was living at his house. Fuller had in his possession several negroes, to which John D. Hall and prisoner claimed title, they being his step-sons.

James M. Oliver was at home on the day of the alleged homicide. Lived about 300 yards from Fuller's house. Heard the report of a gun between sunset and dark, in the direction of Fuller's house. Heard some one cry, "Oh! Lordy," three times immediately after the firing. The next time he saw Fuller, his body was drawn up from Richland creek, about 300 yards from his house. The hands were tied behind him, a chain wound around his waist, and two plow hoes hung thereto. He was shot

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under the eye, and the bullet came out at the ear. There was a severe wound on the head—the skull being broken. Saw the tracks of two men going and coming out of the creek at the bank where the body was found. Witness, on 10th June, saw blood in the horse-lot, on a plank some three feet long, three inches wide and one inch thick. Saw blood on the draw-bar, which had been shaved with an axe, as if to get the blood off. Saw blood and hair on a rock, also, weighing three or four pounds. There was a storm threatening at the time the gun and cries were heard. On next day, went to Fuller's house. Fuller's wagon was standing in the road, nearly loaded with household furniture, &c. horses harnessed, and no one there. Saw two wounds on the cheek, as if made with a knife. Horse-lot is a public place.

James Atkinson saw Fuller on 8th June, about half hour before sunset, about half mile from his house, in witness' field; deceased said he would see witness next day; heard the gun; called at Fuller's house next morning and asked for him; saw prisoner and John D. Hall together; saw the wagon loaded that night; provisions cooked and no one there; saw two persons run off from the house; starlight night; Fuller's hat was in a trunk in the house; there was a light in the house as he approached, but was put out; Fuller's wife, prisoner's mother, died in February, 1849.

John H. Harris saw prisoner the day he arrived from the west on the cars; prisoner asked where his brother, John D. Hall, was; prisoner said he had received a letter or two from him respecting property Fuller had; said he came after it; that his brother said Fuller intended to bring a law-suit for it; said before Fuller should have it, he would have to take all his little pile, and "by God he had come after it, and he be d—d if he did not have it or take him one."

Mrs. Rowland lives a mile from Fuller's; prisoner and John D. Hall came to her house on 8th June and asked for powder; she objected, and they insisted on two or three loads; prisoner pouring it out, and saying his brother wanted to try his pistol.

Wm. Atkinson saw deceased about one hour before sun down on 8th June; saw prisoner and John D. Hall coming up from the creek on 9th June, between one and two o'clock, p. m.

George Warren was at Fuller's house on afternoon of June 8; asked what was to be done about the property; prisoner said he

had made a proposition to Fuller, which he had refused, and that he would stay there until Christmas or Christmas year, but what he would settle in some way or other; prisoner and John D. Hall were there together.

Catharine Thomas heard prisoner swear he would kill Fuller before he should have one cent of the property.

William Walker, on 10th June, saw tracks of four persons going off from Fuller's; they seemed to stop under a peach tree; thence they went into an old field, where he could trace them no longer; confirmed the testimony of other witnesses on several points.

A. Hutchinson was one of the neighbors who went to Fuller's house on the night of the 9th June; confirmed the testimony as to wagon, the lights, the running away of the persons from the house; *Abram*, one of the negroes, disappeared.

James King was there also; heard two voices at the wagon, and thought one was prisoner's; the things at the house were very much scattered; a trunk in the wagon was broken open, and had Fuller's hat, tumblers, spoons and clothing in it; there was a black wool hat in a bag, which appeared to be wet, as if it had been washed.

Thomas Atkinson. Fuller had on a black wool hat, 8th June, about sunset, in his own field; heard the gun.

John Zachery was at Fuller's 9th June; heard the voice and believed it to be prisoner's.

Samuel Tomlin. Prisoner came to his house in Newton County, on evening of 10th June, with John D. Hall and the negro Abram, all on foot, and insisted on staying all night; said they had missed the cars at Buckhead, and had been walking all day; said it looked bad to see a man walking and having a negro; said his brother had a negro girl given to him and he persuaded him to swap the girl for this boy; they stayed all night and left about daylight.

Lewis Zachery saw prisoner 11th June; heard of the murder, and the rumor that the murderers were in Newton County; went to the depot to watch; saw two white men and a negro above the platform on the track; he intercepted them in a deep cut; said, "gentlemen, murderers, you can go no farther;" prisoner and John D. Hall sunk on their knees; prisoner ran off; John D. Hall tried to run, and witness knocked him down; wit-

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caught the negro, but John D. Hall ran off; both were afterwards caught: prisoner said, "as for killing Fuller, he knows nothing about it, and he must have been killed by negroes, if killed at all."

S. M. Ramsey.

Prisoner had a pistol, powder-flask and knife when arrested.

Peter Clark met prisoner the day he arrived from the west; prisoner asked where his brother John was, and what the people said about the property at Fuller's; witness replied he expected there would be a law-suit: prisoner said, I shall stand no law-suit, and among other things, slapped his hands on his pocket and said he had there what would get the property; prisoner had a pair of saddle-bags with the weights off the clock in them.

John D. Hall together with witness was at Fuller's on 9th June, and testified for Fuller: prisoner went off towards the house and walked to and from the passage, when John D. Hall said Fuller had gone up the country to Mr. Malone's; witness asked what time he started: Hall paused and answered, yesterday evening; prisoner was about fifteen steps off, and he thinks might have heard what was said; prisoner said nothing.

Defendant's counsel objected to the sayings of John D. Hall; which objection the Court overruled, on the ground that the evidence already produced had established the fact of a joint action and intention, sufficient to authorize the admission of the testimony. To which decision defendant objected, yesterday evening; similar evidence was offered to be proven by William Atkinson, and the same objection made: which being overruled, defendant excepted.

On which several exceptions error was assigned.

CONF. for plaintiff in error.

Sol. Gen. BARTLEY and N. G. FOSTER, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.
 writ of error to Greene Superior Court, up
 against William H. Malone, other

ed William H. Hall. The cause came on for trial at the March Term, 1850; of the Superior Court of said County, His Honor ELMER V. JOHNSON, presiding:

We propose to consider the questions made in the record, in the order in which they are presented in the bill of exceptions.

[1.] When the State presented to the prisoner a panel of forty-eight Jurors, he challenged the array, on the ground that they had not been chosen and sworn according to law, in this, that they were selected by a majority of the Justices of the Inferior Court, together with the Clerk and Sheriff of the County, and by them sent up to the Judge of the Superior Court; whereas, the said Jurors should have been selected, by the Clerk, in the presence and under the immediate direction of the Judge of the Superior Court.

The sum of this objection is, that the forty-eight Petit Jurors were chosen under the Act of 1805, (*Prince*, 443,) instead of the Act of 1797, (*Watkins*, 627,) as they should have been.

By reference to these Acts, it will be seen that *Petit Jurors* are not selected at all, under either of them. Under both, the Clerk of the Superior Court is directed to procure from the tax books, a list of all persons liable to serve as Jurors, according to the qualifications therein prescribed, (which, by the way, are precisely the same under both Acts;) and this is a mere mechanical duty to be performed by that officer, and one which involves no discretion whatever. From this list, by the Act of 1797, the Clerk, under the direction of the Judge of the Superior Court, is to select the *Grand Jury*; and from the same list, under the Act of 1805, the *Grand Jury* is to be selected by the Justices of the Inferior Court, or a majority of them, together with the Clerk and the Sheriff.

The change, therefore, is only as to the mode of selecting the *Grand Jury*, and the persons remaining on the list, under both Acts, are to be *Petit Jurors* for the trial of all civil and criminal causes; and under both, persons returned as Jurors, who are not qualified to serve, are to be discharged on challenge and proof by either party, or on the Juror's own oath as to his incompetency.

Mr. *Prince* is right, therefore, in assuming that the mode of selecting Jurors under the Act of 1797, is superseded by the 57th section of the Act of 1805; and the uniform practice of the Sa-

perior Courts throughout the State, for near fifty years, is justified by a proper construction of these Statutes; and our judgment is, that the objection taken to the decision below, overruling the motion to quash the array because the Jurors were improperly drawn and sworn, has nothing in it.

[2.] The panel was then put upon the prisoner, and Joseph Nelson and Abner B. Ely, having been sworn as Jurors in chief, Bernard Moore being called, and having shown himself competent, by answering negatively the questions propounded to him under the Act of 1843, he was, at the request of counsel for the accused, put upon triors, and the two Jurymen aforesaid were appointed for that purpose, who, without having been sworn as triors, returned a verdict that Moore was competent. The prisoner announced that he was content with Mr. Moore, and he was sworn in chief. Several other Jurors were also passed upon by said triors, each of whom was found to be competent, and challenged peremptorily by the defendant.

It being subsequently discovered that the two Jurors who had acted as triors, were not specially sworn as such, the Court directed the list to be again called, commencing with the names of those who had been passed upon by the triors; and the prisoner objected to each, upon the ground that they had already been put upon him and peremptorily challenged; which objection was allowed by the Court, and the Jurors were set aside for cause, and not counted against the prisoner.

When the name of Bernard Moore was called, he was put upon the prisoner and objected to, on the ground *that he was sworn already in chief as a Juror to try the prisoner*. The Court sustained the objection, and decided that Moore should be of the Jury to try the cause. The prisoner, by his counsel, excepted to this opinion.

We have bestowed much consideration on this portion of the record. The ground of challenge to Moore was, that he had already been sworn in chief, and the presiding Judge certifies that he understood the objection as tantamount to insisting that he should serve as a Juror.

If this explanation of the proceeding be correct, and it seems to me to be the only reasonable one that can be given, no injustice has been done. *Consensus tollit errorem*, (2 Just. 123,) viz: the acquiescence of a party who might take advantage of an error

obviates its effect. Still, if upon an examination of this record, we had found it did not justify the construction put upon it by Judge Johnson, and that by reason of this misunderstanding, the prisoner had been deprived of some legal right, we should have felt constrained to remand the cause. Such, however, in our judgment, is not the fact. It is now contended in the argument, that this was a challenge for cause, and that being allowed, the Juror should have been set aside, as a matter of course; but nothing had transpired as to Bernard Moore, which would, in the least, affect his competency. He had, when interrogated, not only stated on oath, that he had formed and expressed no opinion in regard to the guilt or innocence of the prisoner, and that he had no bias or prejudice resting on his mind for or against him; but he was put upon triors and pronounced indifferent by them, and having passed through this ordeal, the prisoner professed himself satisfied, and he was sworn well and truly to try the issue between the people and the prisoner. What, I ask, was there in all this, to make him objectionable for cause? Nothing. As to the other Jurors who had been found competent and then peremptorily challenged, it might be supposed that their capricious rejection by the accused had excited some ill-will in their minds towards him, and hence the Court very properly, perhaps, permitted them to be set aside, without charging them to the prisoner as peremptory challenges. But the very reverse of this was true as to Moore. His acceptance was calculated to conciliate him toward the prisoner.

It will be observed, too, that there is no complaint by the prisoner, that Moore was forced upon him, notwithstanding he objected to him on account of the irregular manner in which his competency was ascertained. Had this been done at the time, as the trial progressed, or afterwards, upon a motion for a new trial, the result might have been different. It was competent for the prisoner to have accepted the Juror before he was put upon triors, and equally so after he was passed upon by the triors; and this he did, as is shown by the record. The objection, therefore, comes too late, and while it is specious and ingenious, the facts in the record, unfortunately, do not support it. Taking any view, therefore, of this exception, the Court is of opinion that there is no error.

[3.] We come now to the last error assigned. The prisoner,

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by his counsel, objected to the sayings of John D. Hall, the brother of the accused, as testified to by the Atkinsons, James and William, but was overruled by the Court, for the reason that the evidence previously adduced, had sufficiently established a common purpose in the perpetration of the felony; to authorize the admission of this proof.

We will not recapitulate the evidence. It is exceedingly questionable whether the sayings of John D. Hall were not heard by William. The probability is that they were. He was certainly in a position where he might have heard them. These sayings could have had but little influence, if any, on the minds of the Jury; their object being merely to put inquirers upon a false scent as to the whereabouts of the deceased; but, in our opinion, the facts which were in proof, fully warranted the introduction of these sayings; for, whatever doubt might exist as to a privity of intention, a community of action was most palpably proven.

But the counsel for the prisoner insists, that admitting the evidence to have established a common purpose between these parties, that still it is the acts only, and not the sayings of the accomplices, which can affect the accused. But we apprehend the law to be otherwise; and the rule upon this subject, to be correct, as this briefly stated by Ch. J. Tilghman, in *The Commonwealth vs. Glebe and others*, (2 S. & R. 9)—“You cannot,” says he, “affect one man by the speeches of another, until you have proved that they were engaged in a common enterprise; that being proved, the words of one are evidence against the other, but not conclusive.”

Mr. Roscoe, in his *Treatise on Criminal Evidence*, maintains the same doctrine. After stating that where several persons are proved to have combined together, for the same illegal purpose, any act done by one in reference to the common object, is, in contemplation of law, as well as in sound reason, the act of all, he adds, that verbal declarations are equally admissible, and that declarations made by one of the party in pursuance of the common object, are evidence against the rest, who are as much responsible for all that is said and done by their associates, in carrying into effect the concerted plan, as if it had been pronounced by their own voice, or executed by their own hand. *Roscoe on Crim. Ev.* 80.

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The Court, therefore, is unanimously of the opinion, and such is their judgment, that there is no foundation for this writ of error.

It only remains to say, that we leave this unhappy man to the awful doom which awaits him. A fitter sacrifice, perhaps, has rarely been offered up on the altar of criminal justice. May he find that mercy which he so relentlessly denied to his helpless and bleeding victim!

No. 67.—MICHAEL J. KENAN and FARRISH CARTER, executors of George W. Murray, deceased, plaintiffs in error, vs. WILLIAM P. HALL and others, defendants.

[1.] Where a balance is found to be due legatees, in the hands of executors, who have been guilty of gross neglect, in not making annual returns to the Court of Ordinary, of the condition of the estate in their hands: *Held*, to be liable for such balance, with interest from the time it fell due, for six years, to be compounded at the end of that term, and at the end of every subsequent term of six years: *Held*, also, that such executors, neglecting to make annual returns, are not entitled to commissions for their trouble in managing the estate.

Exceptions to award, in Baldwin Superior Court. Decided by Judge JOHNSON, February Term, 1850.

William P. Hall and others, legatees under the will of George W. Murray, deceased, filed a bill against the executors, M. J. Kenan and F. Carter, for an account and settlement.

On motion, the cause was referred to the arbitrament of Charles J. McDonald and Francis H. Cone, and an umpire selected, as provided in the rule; by which rule, it was further provided, that on all questions of law, on request of either party, the decision should be in writing, and returned to the next term of Baldwin Superior Court, to be submitted to the Court for its decision, with liberty to either party to sue out a writ of error.

On a motion to make the award the judgment of the Court, the executors objected to the decision of the arbitrators as to the mode of computing interest against them. The following is the written decision, in compliance with the rule of reference :

" In taking the account of the liability of the executors on notes to the testator, the mode of charging interest on such notes, and especially as to the note of Dr. Fort, due to the testator on the 25th January, 1835, (amount, \$3,518 80,) was discussed. Held, by Messrs. Cone and Sayre, that where the debtors were solvent, and the debts, by ordinary diligence, could have been collected within a reasonable time after the qualification of the executors, interest should be charged on the debts for six years, and then the interest combined with the principal, as debt; and thence subject to rests at the end of six years. And as Col. Carter did not take the debt of Dr. Fort into his hands until 26th March, 1840, and he renewed the debt, including interest from its maturity, and extended the time of payment, interest should be computed, on this new principal, for six years.

" On this point, Mr. McDonald held a contrary opinion, holding the rule of law, previous to the Act of 1847, to be, that executors are liable to account for simple interest only, and this case falls within the general rule. The executor did not make compound interest, nor use it in trade, but permitted it to remain in the hands of debtors for years; and when he collected a large sum, he immediately invested it in State stock. In 1838, suit was instituted on a note for \$10,000 given by deceased, in behalf of Burton Hepburn; and in 1838 or 1839, suit was commenced on an alleged defalcation of \$30,000 or \$40,000 of testator, while acting as Cashier of the Bank of Darien. The first was determined in 1843. The last was eventually compromised in November, 1847, and within four months thereafter, Carter paid complainants \$10,000."

This arbitrator gave his reasons, at some length, why, under these circumstances, compound interest should not be charged, and referred, especially, to the fact that there was no evidence that the executors loaned the money—used it, or in any wise made profits thereon.

The Court overruled the objections, and sustained the award of the majority upon this point. To which decision, the executors excepted.

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The award denied to the executors any commissions, on the ground that they failed to make returns to the Court of Ordinary, as required by law; to which the executors objected. The Court overruled the objections, and the executors excepted; and upon these exceptions, error is assigned.

McDONALD, for plaintiff in error.

GONE, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] Two grounds of error are assigned to the judgment of the Court below.

1st. That the Court erred in deciding that the executors were not entitled to commissions.

2d. That the Court erred in deciding, that after the expiration of six years, the interest should be compounded—that is, the interest should be added to the principal debt, and interest be calculated on the whole amount.

In *Fall vs. Simmons et al.* (6 *Georgia Rep.* 265,) this Court held, that an executor or administrator, who fails to make annual returns, according to law, forfeits all commissions for his trouble in managing the estate. The Act of 1792 expressly declares, that if any executor or administrator shall neglect to render annual accounts, he shall not be entitled to any commissions for his trouble in the management of the estate. *Prince*, 226. But it is said this Act only applies to Courts of Ordinary, and does not apply to Courts of Equity, when the executor is required to account in the latter Court.

The Act is a general one, and its policy is as applicable to the one Court as the other. The Act of 1810 makes it the duty of all guardians, executors and administrators to render a full and correct account of the estate, as well as the condition of the estate, once in each and every year, to the Court of Ordinary, as well as a statement of the transactions of such estate, on oath. *Prince*, 240. Failing to comply with the requirements of the law, the executors must abide the penalty prescribed by the law, for their neglect. In 1836, Kenan and Carter were qualified as executors. In 1838, they made a joint return, which shows a large amount

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of assets in their hands, belonging to the estate of their testator. No return was made by either of the executors until 1846, when Carter made a return. In 1847, Carter made another return, and in 1848, after the commencement of a suit against them by the legatees for an account. Carter made two returns.

No return was made by Kenan until 1848, after the commencement of the suit. From 1838 to 1846, a period of eight years, no return was made to the Court of Ordinary by either executor, of the condition of this large estate in their hands. When called on to account, Carter, one of the executors, denied that he owed complainants anything, but insisted that the estate was indebted to him. There was found to be a balance due, however, from Carter to the complainants, including interest up to January, 1850, the sum of \$7,297 25; and there was found to be a balance due from Kenan, including interest up to the same time, the sum of \$22,146 68.

The defendants were charged with simple interest on the respective amounts, found to be in their hands, for six years, and then, the principal sum and the interest were added together, and interest computed on the whole amount. In the case of *Fall vs. Simmons*, (before cited) this Court held, that an administrator who had been guilty of gross neglect, in not making returns of the condition of the estate in his hands, was liable to a distributee for the balance found in his hands, after allowing all disbursements, with interest from the time it fell due, for six years, to be compounded at the end of that term, and at the end of every subsequent term of six years. The rule established in *Fall's* case, we think, was liberal enough, and especially so, when applied to the facts of this case. It is said that there is no evidence that the executors loaned the funds in their hands, or used them for their own benefit. The answer to that suggestion, is the refusal or neglect of the executors to make annual returns, showing the true condition of the estate in their hands, raises a presumption against them, and in our judgment, they were properly charged with compound interest, after the expiration of six years, according to the rule established by this Court in *Fall's* case.

Let the judgment of the Court below be affirmed.

No. 68.—JAMES THOMAS, administrator, &c. of George Bell, plaintiff in error, vs. JOHN W. KINSEY, defendant.

- [1.] Cross interrogatories are sufficiently answered, when the witness answers them according to a reasonable understanding of their object and meaning.
- [2.] Interrogatories which have been read on a previous trial, without exception to their execution, cannot be excepted to at a subsequent trial. Failing to except at the first trial, *Held* a waiver of the exception which then might have been taken.
- [3.] The sayings of an attorney who has sold a note belonging to his client, without authority, relative to his title to the note, not made at the time of the sale, *Held* to be inadmissible in a suit between the purchaser and the true owner for the note.
- [4.] When it appeared from the return of the commissioners, that questions were put to the witness, and answered by a person purporting to be the attorney of one of the parties at the time of execution, the other party not being present: *Held*, that the interrogatories are defectively executed, and must be rejected.
- [5.] *Held*, that one who buys a note, bill or other negotiable security, bona fide, and for value, after it is due, from one who has no title to it, acquires no title against the true owner.

Trover, in Hancock Superior Court. Tried before Judge BAXTER, April Term, 1850.

This was an action of trover, by John W. Kinsey against George Bell, (and since his decease, James Thomas, his administrator,) for a promissory note for \$900, made by Jesse B. Battle, payable to John W. Kinsey or bearer, and dated 16th October, 1844, and due at one day.

Plaintiff proved the demand of George Bell, and his refusal to deliver it up, on the ground that he had purchased the note of Nelson Spain, and paid him for it.

Plaintiff offered in evidence, the deposition of Nelson Spain, examined by commission. To which defendant objected, on the ground that the witness "failed to answer the second cross interrogatory, and artfully evaded the same." The question was, "What was the consideration of the note, and was there, or not, a demand to Stephen Blount settled at the same time? If yea, for what amount, and were you or not attorney for Blount and

Kinsey in the settlement of the same?" The answer was, "He received money as the consideration. Deponent does not know anything of a settlement between Stephen Blount at that time; but answers that he was attorney for Blount and Kinsey."

The Court overruled the objection, and defendant excepted.

The depositions were, that he knew the note, and is of opinion that it belonged to Kinsey at the time he saw it; that he received it from Kinsey for collection; that he did transfer it to Bell, and his impression is that Kinsey did not authorize him to do so, and that he does not know that Kinsey ever received any part of the consideration for which it was transferred. He received from Bell a valuable consideration, but did not trade the note as his own, to the best of his recollection. Did not recollect certain statement to Dickson and Thomas, inquired about. His impression is, that he had no authority to trade the note, and does not recollect ever saying that he had authority.

David W. Lewis being introduced and examined by plaintiff, as to the fact of Spain being the attorney of Kinsey in certain suits *vs.* William Battle and others, defendant's counsel proposed to ask the witness, "Whether, or not, he did not know that Spain claimed the note as his own, that he spoke to others about the note as his own, and that he offered to trade it to others as his own note?" Plaintiff's counsel objecting, the Court ruled out the testimony, and defendant excepted.

Defendant offered in evidence the deposition of Nelson Spain, in answer to the following interrogatories:

2d. Did you, or not, write the annexed letters at the time they bear date, and to the persons to whom they are addressed? (The letters referred to, were one to Jesse W. Battle, and the other to George Bell, in which he averred his right to sell the note, claiming it as a part of a fee or fees due him by Kinsey.)

3d. Was, or not, the letter addressed to Jesse B. Battle, in answer to a letter addressed by him to you? If yea, have you that letter in your power, custody or control? If yea, please annex a copy of it to your answers.

4th. Was or not the letter addressed to Bell, in answer to a letter addressed by him to you? If yea, have you the possession, custody or control of said letter? If yea, please annex the original to your answers. If you have not the possession of said letters, state the contents as near as you can recollect?

5th. Did not the letter last referred to, contain a statement by Mr. Bell, to the effect, "I am greatly astonished to learn that Kinsey claimed the note of Battle as his own. I should not have traded for it," &c. State the whole contents of the letter, as near as you can?

6th. What business did you undertake for Kinsey, as an attorney, and on what terms? How much was Kinsey to pay you? State all your contracts with him, and when made, and state particularly if any contract was, or not, made by you with his agent or himself, since you answered the letter to Mr. Bell.

7th. Did you, or not, in Sparta, before the close or compromise of the case with William Battle, say to James Thomas and William Dickson, that the half you got out of the two cases against William Battle, was to go to you for your fees; and did you, or not, tell William Dickson and his family, or some of them, in Sparta, after the cases were compromised, that the note you traded Mr. Bell belonged to you? State what you did tell either Mr. Dickson or his family?

At the time of the taking of the deposition, two other questions were propounded by "John A. Corwin, attorney for defendant."

To the reading of these depositions, counsel for plaintiff objected—

1st. Because they are too leading.

2d. Because defendant seeks to discredit his own witness.

3d. Because it is incompetent for defendant to prove what the witness said or did when he traded the note.

4th. Because the witness is interested.

5th. Because it appears that one Corwin attended the taking of the interrogatories, as an attorney for the defendant, and did propose interrogatories to the witness.

Defendant's counsel stated that he did not propose to read the answers to the questions propounded by Corwin, and proposed to shew, by the deposition of Corwin, that he acted without fee, and was not employed in the cause.

The Court sustained the objections, and ruled out the testimony; to which decision defendant excepted.

Defendant's counsel requested the Court to charge—

1st. "That if they believe Bell traded for the note, and paid Spain a valuable consideration, without notice of plaintiff's rights, that he acquired a good title, and in order to destroy it, he must,

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in taking the note, have acted *mala fide*." The Court refused so to charge, and defendant excepted.

2d. - That trading for a note after it becomes due, is not of itself *mala fide*, but at most, a circumstance to raise a presumption, which may be rebutted by other circumstances."

The Court charged, "Though it may not be evidence of bad faith, the law has put a brand on the note over-due; they are considered dishonored: it is a circumstance requiring inquiry on the part of the person taking it; it is notice of defect of title, if taken after due, and the title of the real owner not impaired." To which charge and refusal, defendant excepted.

3d. - That if Spain held the note as an attorney for collection, he had a right to receive the money on the note, either from Bell or Battle." The Court charged, "An attorney has a right to receive payment from any third person; but if the money received is not in payment of the note, he can make no title to the note to the person so paying;" and defendant excepted.

The Court charged the Jury, among other things, "If you believe the note was placed in Spain's hands for collection, as an attorney, then whether Bell paid a valuable consideration or not, and with or without notice, and whether, or not, Bell knew that he held it as attorney, Spain could convey no title."

To this charge defendant excepted, and upon these several exceptions error is assigned.

JAMES THOMAS and N. G. FOSTER, for plaintiff in error.

A. H. H. DAWSON and CONE, for defendant.

By the Court.—NISBET, J. delivering the opinion.

The Court below did not, in our judgment, err in admitting the interrogatories of the witness, Spain, tendered by the plaintiff. The action was trover, brought to recover a promissory note by Kinsey, the original owner, against the administrator (Mr. Thomas) of Bell, who had bought it of the witness, Spain. The great question in the case was, whether the title of the purchaser was good against the title of the first owner and payee of the note. The plaintiff below took out a commission for the purpose of examining, and did examine Spain, relative to the owner-

ship of the note; the time when it passed out of the possession of Kinsey, the first owner; as to who received the note from him; for what purpose was it delivered to him, Spain; whether he was authorized to transfer it; to whom was it transferred, and whether the plaintiff had received any part of the consideration for which it was transferred. The defendant propounded to the witness several questions upon cross examination, and among them this, to wit: "*What was the consideration of the note, and was there, or not, a demand to Stephen Blount settled at the same time.*" To this question the witness answered, "*He received money as the consideration.* Deponent does not know any thing of a settlement between Stephen Blount, at that time. He was attorney for Blount and Kinsey."

The objections to the admissibility of these interrogatories are two—

1. Because, although the commission issued before the death of Bell, yet it was executed after his death, and before his representative was made a party.

2. Because the second cross interrogatory (quoted above) was not answered.

As to the first exception, it is sufficient to say, that the commission issued during the life of Bell, and when there was a case fully represented in the Court, and the evidence was offered after the representative of Bell had been regularly made a party in that cause. In view of the exception, the time of executing the commission is immaterial. The defendant was deprived of no right, by reason of the fact that the commission had been executed after the death of Bell, and before his administrator had been made a party. The witness had been cross examined during Bell's life. The cross examination went out with the commission. What other right had the defendant touching the examination of the witness? The action did not abate by the death of Bell—it was only in abeyance.

[1.] The second exception is, also, to our minds, indefensible. Cross questions must be answered, it is true, and if not answered, the execution is defective; and the right of cross examination, particularly in our loose mode of taking testimony by commission, ought to be most carefully guarded. In this case, it seems to us that the interrogatory referred to, (or that part of it in relation to the consideration of the note, the exception being, as we

objected to, asked to that part, was answered according to the view of the material question involved on the part of the witness, as to materiality and proper. Taking into view the character of the dispute between the parties—the living mainly upon the ~~transfer~~ of the note—the character of the direct examination pointing to that effect, and the nature of the direct questions, regarding specially the introduction of the witness to Bell when the transfer was made, we conclude that the witness did understand, and had good reason to understand the question, and was the introduction of the note, as pointing to the fact that a ~~confession~~ would be received up to the transfer of the note. According to the understanding of the question as to materiality, the witness' question answered according to the character of the message and intent, and that is sufficient.

[2.] More than these interrogatories, as appears by the bill of exceptions, were read on a former trial of the cause, without exception. If the exception were good, permitting the interrogatories to be once read without taking, it must be held a ~~waiver~~.

[3.] The second error complained of is the refusal of the Court to admit the testimony of David Lewis, proving the sayings of Spain relative to his title to the note. The record discloses that Spain had received the note, as an attorney, for collection, and had sold it to Bell, the defendant's intestate. We see no reason why Spain was not a competent witness in the cause. His sayings going to support the title to the note in the defendant were, therefore, inadmissible. Had he been proven to be the agent of the plaintiff, authorized to sell the note, his sayings relative to the title, at the time of the transfer, would have been admissible as part of the *res gestæ*; but such agency was not proven.

[4.] The defendant tendered in evidence, the interrogatories of Spain, for the purpose of laying the foundation for an attack upon his credibility. They were objected to by the plaintiff, upon the ground that it appeared from the interrogatories themselves, that questions other than those propounded when the commission issued, were put by one John A. Corwin, attorney for the defendant, and the objection was sustained. The ruling out of these interrogatories, constitutes the third ground of alleged

error. Upon examination, we find that the questions originally propounded, were signed by James Thomas, who had been made a party to the suit, as the administrator of Bell. The commissioners certify to the fact of several additional questions being put to the witness by John A. Corwin, attorney for defendant. They return the questions and the answers to them. According to their return, the questions were put to the witness by an attorney for the defendant, and we are constrained to infer, after the commission had issued—indeed, at the time of its execution. The decision of the Court is sustainable upon two grounds—

1. The Act of 1799, requires a party desirous of taking the testimony of a witness out of the County or State, to give ten days' notice to the adverse party, and to serve him with a copy of the interrogatories. When this is done, and not before, is he entitled to a commission. In this case, the Act has not been complied with. The interrogatories propounded by Corwin, were not served upon the adverse party ten days before the issuing of the commission; indeed, at no time were they served upon him. The reason of this requirement is very clear. It is to enable the adverse party to cross examine the witness in relation to all the subject matters of the direct examination. *Prince*, 425.

2. The presence of counsel for one of the parties, taking part in the examination by propounding questions, prevents its impartiality, and vitiates the whole. Our law makes no provision for the presence of the parties; the examination is in writing, confined to the questions put to the witness before the commission issues, and confided to impartial commissioners. The commission issues in blank, and is filled by the party suing it out. At best, this is a very unsafe mode of taking testimony, in which the party seeking it has the advantage. We cannot guard it too carefully from abuse. In *Glanton vs. Grigg*, this Court held, that depositions taken by a student at law of an attorney in the cause, and in the office and presence of the attorney, are inadmissible. 5 *Ga. Rep.* 424. See, also, *Tillinghast, Starke & Co. vs. Walton*, 5 *Ga. Rep.* 335. This is a stronger case than either of these. Manifestly, impartiality in taking the depositions cannot be presumed, when one party is present by his attorney, and participating in the examination, the other being absent. It was said in the argument, that this is not an objection to the execution of the interrogatories, but to the testimony itself, and, therefore, the an-

swers of the witness to the questions propounded by Corwin only, should be rejected, and the remainder of the depositions admitted. Not so. The objection lies to the execution of the commission. It is not impartially executed. Had Corwin, the attorney for the defendant, being present, asked no question, the whole would be rejected; much more will the whole testimony be rejected in the case made by this record.

[5.] The main question in this case is, whether Bell, the purchaser of this note, *bona fide* and for value, after it was due, from Spain, who had no title to it, acquired a title good against the plaintiff, who is the payee and true owner. The plaintiff in error maintains that he did. The Court below held that he did not, and our judgment is with the presiding Judge. We are aware that the adjudicated cases on this point, in the English and American books, are few; for the reason, no doubt, that it has been considered too plain to admit of question. This assertion may appear to the learned counsel for the plaintiff in error extravagant, holding as they did, that the question was one of subtlety and great magnitude. This cause would have been, without question, one of vast magnitude, had this Court adopted and established the doctrine of the counsel; because, in that event, we would have ordained a *new rule of property*—a rule, as we think, up to this moment unknown to the Common Law. The judgment, however, which we have felt it our duty to render, is entitled to no merit other than that of consistency with the long established law. The apparent difficulty of the question has, I apprehend, grown out of the blending of it with others akin to, but not identical with it. For example, the rule in relation to the title of the holder of a note or bill, bought *bona fide* and for value, *before maturity*, of one having no title, as against the rightful owner, is well established, and is in accordance with the views entertained by the counsel. In such a case, the title of the purchaser is protected, unless charged with *mala fides*. This question is, in many particulars, analagous to that now under review. Under what circumstances the title of a purchaser, *bona fide* and for value, of a bill or note *not yet due*, will be protected, has been, and is to this day, a matter of much discussion in the books; and the language of Judges and elementary writers in these discussions, is not always very discriminating. Being applicable to cases of notes purchased *before maturity* only, for want of distinct-

ness, it often seems to be applicable to cases of notes or bills purchased *generally*, and has been held applicable to cases, therefore, of notes or bills bought *after maturity*; when, in truth, I have no doubt both the Courts and the elementary writers have believed the distinction between these cases to be so well established, and so generally recognized, as to require no careful discrimination. In justice, however, as I shall attempt to show, to more than one of our own great Jurists, and I refer more particularly to *Kent* and *Story*, I must add that they have maintained the distinction with intelligible precision; only, perhaps, too closely following the English formulary, in only *negatively* excluding cases of notes and bills purchased *after due*. Again, there is voluminous discussion in the books, relative to the doctrine of equities, as between the makers of notes and holders, acquiring title both before and after maturity; all of which has just nothing to do with the question of title between the holder, buying of one having no title, and the true owner. From such causes, no doubt, has originated the apparent sanction which the opinions held by the counsel for the plaintiff in error in this cause, has received from the books. It will be seen, however, that this sanction is merely apparent. My duty, then, will be to isolate this question from others; give it its real position in the science; and in that position, determine upon what principles and what authorities it rests.

The general rule of the law of this State and of Great Britain is, that no man can acquire a title to a chattel personal, from any one who has himself no title to it. A contrary rule would subvert the foundations upon which property rests, violate natural justice, and make the law the agent for outraging the first principles of morality. If property found or stolen, or obtained by violence or fraud, could be sold, and the title in the purchaser be maintained against the real owner, then would the law pander to injustice and patronise immorality. However innocent the purchaser under such circumstances may be, and however great his loss may be, and although he is, in fact, the victim of villainy, his title is subordinate to the title of the true owner. He gets the title of his vendor and no more, which must yield to the title of the owner, whenever that is established. This rule is of general application, and embraces all kinds of personal property—applying, generally, to notes, bills and other negotiable se:

currency, as well as to negroes, stocks or horses. To this general rule there are a few exceptions. By the Common Law, property sold in market overt, is not embraced in it; and by the Common Law, and by the judgment of this Court, negotiable instruments, transferable by delivery, and *when a negotiable*, are an exception. The law touching this last named exception, was maturely considered in *Mitchell vs. Payson*, 4 *Geo. Rep.* 257. The rule settled in this case, as we then thought and still think, according to authority, is this: — The purchaser of a bill, note or other negotiable security, transferable by delivery, who takes it *before it is due*, from one who himself has no title, *bona fide* and for value, acquires a good title, but his title will be defeated by *mala fides* in the purchase." What it is especially necessary to note is, the general rule, embracing within its wide range, bills, notes and other negotiable securities, as well as all chattels, and the exception, which embraces in its restrictive scope, negotiable securities which are transferred before they fall due. It could avail nothing now to question the equity or the morality of this exception. The equity of it has been put upon the principle, that where one of two innocent persons must suffer loss, by the fraud of a third person, it must fall upon him whose credulity, or negligence, or misplaced confidence, has enabled such third person to perpetrate the fraud. The principle is not questioned. But before the exception can be sustained upon it, the case which is brought within the exception, ought to be the case contemplated by the principle; that is to say, the negligence, credulity or misplaced confidence ought to be demonstrated. But in the application of the rule upon which the exception goes, are these or any of them, always required to be demonstrated? The answer may be given by looking to the cases made in the books. For example, that faith in agents which is so necessary to commerce as to be its soul, is the *misplaced confidence* by virtue of which, in many cases, the honest owner loses his property; for, I apprehend that there are numerous cases where a commercial agent having, without authority, sold securities not due, belonging to his principal, and appropriated the proceeds, the title of the purchaser has been protected. I will not pursue this inquiry farther. The true ground upon which the exception rests, is commercial expediency. It is to promote the ready circulation, and to extend the credit of negotiable paper, and in so doing subserve the great

interests of commerce. The exigencies of commerce, require that they should become practically an equivalent to, and representative of money. Such character they have, to a great extent, and have derived it, in no small degree, from that ready circulation which the exception gives to them. That it promotes the interest of all mercantile communities, there can be no doubt. It is beneficially applicable to our own State—not solely mercantile, agricultural or mechanical. If it be conceded, (what I do not assert,) that it works injustice to the owner, yet it is one of those instances in which public good is promoted by individual injury. It is, at all events, established by authority, overwhelming in character and in amount.

Does this exception extend to notes, bills and other securities *past due*? It does not. There are cases, which upon slight perusal, seem to be cases of *over due* securities; but upon careful examination, they are found to be cases of *premature* securities. Such is the case of *Peacock vs. Rhodes*, (*Dougluss*, 636,) relied upon by Col. *Foster*. I think it may be safely said, that there is not to be found a single judgment of a single Court of any authority, which has extended it to paper *over due*. Certainly I have found no such judgment. Then, the question here made, is disconnected with all the learning in the books, which applies to the exception I have been considering. Bills, notes and all other negotiable securities, after they are due, are subject to the great property rule first announced. That is, that he who, *bona fide* and for value, buys it from one having no title, acquires none. He buys with it the title of his vendor, and does not get a title better than the rightful owner.

We are invoked to extend the exception to this general law of property, to paper transferred after it is due. Upon expediency we ought not, and upon authority we dare not, respond favorably to the invocation. It is argued, that the same necessity of commerce, which at first suggested, and which now justifies the exception as to paper *not due*, will authorize its extension to paper *over due*. The reason for the one, it is insisted, is equally as strong as the reason for the other, and it is asked wherein consists the grounds of the distinction? To which it may be replied, that the demand for increased negotiability in notes and bills, particularly in Georgia, is fully satisfied by the one exception. The law merchant, as it stands, is adequate to all the requirements of busi-

ness in our State, and I see no reason why the Courts should legitimate notes and bills over due, into a more active circulation, at the expense of a fundamental law of all personal property. But there is reason for the existing exception, to be found in the character of a paper *not due*, which is not found in the character of a paper *past due*; and in the rights and obligations of the parties on a note *not due*, which are not found in the rights and obligations of the parties to a note *past due*. The utility of notes, bills, &c. grows out of their negotiability, and they are negotiable because, in the language of Mr. Story, they are practically "equivalent to, or the representative of money." Now, in a very eminent degree, they are equivalent to, and the representative of money, *before they are due*. *Before maturity* they stand unimpeached. The presumption of law is, that they will be paid at maturity, and because of this presumption, they pass freely from hand to hand, as the representative of money. Bills, particularly, in practice, are made to represent money. By them exchanges are conducted; estates transmitted from empire to empire, and, indeed, the affairs of foreign commerce chiefly transacted. It would be a curious and interesting inquiry, to attempt the ascertainment of the amount of the capital of the world, at any one time afloat in bills and other negotiable securities running to maturity. Confidence in them is the basis of commerce. *Before maturity*, the purchaser is not subject to the equities attaching to the paper, between the original parties, unless he buys with notice of those equities, and such notice must be carried home to him, before they can be set in against him. Such being the legal character of notes and bills *before maturity*, there is reason found in that character, for facilitating and extending their circulation, by protecting the title; and it was on these accounts that the British Courts laid upon this title their strong hand and created the exception. It became the law of Georgia by our Adopting Statute, and is the law, as I suppose, of every State in the Union. But how stands the same bill or note *after maturity*? The time of payment being past, the presumption of the law is, that there is some good reason why it was not paid. It is not genuine; there was no consideration, or it has failed or was illegal; there are off-sets or other equities against it; or the parties liable are not able to pay. It goes into circulation dishonored—*branded with a protest*. The purchaser takes it upon the credit of the in-

dorser, and subject to the equities. It is not, and in the character it wears, it ought not to be considered as fully, by large odds, the equivalent or representative of money, as it was before maturity. Why, then, should its negotiability be extended by protecting the title of the holder? Indeed, instead of promoting the interests of commerce, by fostering and increasing the circulating quality of such paper by protecting the title, the reverse effect would result. Commerce would be injured by extending the circulation of paper not entitled to credit.

It is said that much of this reasoning, although applicable to notes and bills negotiable by indorsement, does not apply to notes payable to bearer, and negotiable by delivery, or to notes and bills payable to order, and indorsed in blank. It is urged that the title passes by delivery—goes with the note—is a necessary element of the paper itself, and is evidenced by possession; that when one transfers such paper by delivery, he does not become a party to it, and is not liable on it, and that, therefore, the holder cannot look to him, as he may to an indorser—he does not take it on the credit of the transferer. From all of which the inference is drawn, that the title thus acquired is good in the holder, to such a note or bill *over due*. Now, all these things are generally true. The title passes by delivery, and possession is evidence of it. So of a horse; yet the title to the horse and the bill does not, thereby, become unimpeachable. The possession in either case, is only *prima facie* evidence of title, and may be resisted. It (the title) may be shown to have been acquired through one having no title. *Story on Prom. Notes*, §43. *Story on Bills*, §60. *Chitty on Bills*, ch. 5, pp. 180. 252. 8th edit. *Bailey on Bills*, 6th edit. ch. 1, §10, p. 31.

Again, although the transferer of a note or bill, negotiable by delivery, is not liable to the transferee on the note or bill, he is not, by any means, free from responsibility. Unless it be expressly otherwise agreed, he warrants by implication, that he is the lawful holder, and has a just and valid title to the instrument, and a right to transfer it by delivery. He incurs liabilities on other grounds, which I need not state. *Story on Prom. Notes*, §118, p. 127. *Ib. on Bills*, §§109, 111. I do not consider that notes and other securities, negotiable by delivery, in reference to this question, stand upon grounds different from such as are only negotiable by indorsement.

I close this discussion by referring to a few authorities which sustain our judgment. Mr. *Story*, when discussing the rights of the holder, says, "Hence it is that a *bona fide* holder for value, without notice, is entitled to recover upon any negotiable instrument, *which he has received before it has become due*, notwithstanding any defect or infirmity in the title of the person from whom he derived it."

Ch. *Kent* says, "The *bona fide* holder can recover upon the paper, though it came to him from a person who had stolen or robbed it from the true owner, provided he took it innocently, in the course of trade, for a valuable consideration, and *not over due*," &c.

Similar language is used by other elementary writers, which I forbear to quote. In relation to these elementary extracts, I remark, that the writers are discussing *the title* of the holder, when derived from one *holding no title*, and one of *the conditions* upon which they make that title good is, *that it be acquired before the paper is due*. The inference is logical and irresistible, that if the title is acquired *after it is due*, it is not good. 1 *Story on Prom. Notes*, §191. 3 *Kent's C.* 78. *Baily on Bills*, 524, 528.

The case of *Down vs. Halling and others*, (4 *Barn. & Cress*, 330. 10 *Eng. Com. Law R.* 347,) is an authority in which the very question I have discussed is considered and adjudged. That was an action of assumpsit for money had and received, brought by the true owner of a check against a purchaser, who bought it after it was due, from one who had no title, and to which purchaser it had been paid. The Court likened the check to a bill *over due*, and held that the purchaser acquired no title, and was, therefore, liable to the plaintiff. *Bayley, J.* said, "There is no question whatever in the case, if the distinction between bills over due and not due, is adverted to. If a bill, note or check be taken after it is due, the party taking it can have no better title to it, than the party from whom he takes it, and, therefore, cannot recover upon it, if it turns out that it had been previously stolen or lost. This is, therefore, just like the case of a bill taken after it is due, and the party taking it has no better title than the person from whom he took it, and cannot recover upon it."

Holroyd, J. held the same opinion. The case stood over for consideration upon some point in it, and afterwards, *Abbott, C. J.* among other things, said, "It was proved that the check was

given to the plaintiff by his brother. By that delivery the property in it vested originally in the plaintiff. It farther appears that the check came into the possession of the defendant five days after its date. We are of opinion that an instrument of this kind, coming into the hands of a party so long after its date, is to be considered in the same light as a bill of exchange over due, and in such case it is incumbent on the party who takes the instrument under such circumstances, to show that the party from whom he took it had a good title to it."

The case of *Emmerson vs. Crocker*, (5 New Hamp. R.) is a case immediately upon the question, and deciding that the holder of a note, transferred to him *after it was due*, by one having no title, acquired no title to it.

In a late case decided in Connecticut, (17 Con. R. 511,) *Clarke vs. Sigourney*, where A gave his note to B, payable to B or order, on a certain future day, which lay in his hands until his death, which was long after it fell due, and after his death came into the hands of C, his executrix, with the name of B indorsed in blank on the back of it, who delivered it to D, in the state in which she found it, for a valuable consideration, it was held, that C, as executrix or otherwise, had no authority to deliver the note as a note indorsed by B; that D consequently had acquired no legal title to it, and that *as the note came into the possession of D after it fell due, it was subject to the defence of a want of title in him.*

I need scarcely add that the judgment now pronounced does not, in any way, interfere with the negotiability of over due notes and bills and other securities, by any fair and legal transmission of title from the owner.

Let the judgment be affirmed.

No. 55.—ANDREW TURNER vs. WILLIAM COLLINS.

[1.] An application for a certificate to prevent damages being assessed, under the Act of 1845 creating the Supreme Court, will not be heard after the term at which the case was determined.

This was an application on the part of Andrew Turner, who was plaintiff in error in a writ of error, returnable to and decided at March, February Term, 1850, for a certificate that the cause was not brought up for the purpose of delay, in order to be relieved from the ten per cent damages provided in the Act organizing this Court.

L. J. GREEN, for the motion.

DOTAL and NOLAN, contra.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] By the 5th section of the Act of 1845, it is provided, that "if the decision and judgment of the Court below, be for any sum certain, and be affirmed in the Supreme Court, the plaintiff may, in the Superior Court, enter judgment against the defendant and his securities, for the amount of principal, interest and costs, as shall have been confessed or found by a Jury, and ten per cent damages on the principal sum, and have execution *immediately after the decision of the Supreme Court*, so certified as aforesaid: Provided, that if any one or more of the Judges of the Supreme Court shall certify, that in his or their opinion, *such cause was not taken up for delay only*, then, and in such case, *the damages shall not be allowed.*"

The question presented for our determination is, *can an application for the certificate to prevent damages being assessed, be made after the term at which the cause was decided?* We think not. The Statute entitles the party to an execution for his principal, interest, costs and *damages, immediately after the final decision in this Court*; and this right would negative the idea that an application could be made to stay these damages after the remittitur had been transmitted to the Court below.

Besides, it would be both mischievous and inconvenient to al-

low such a practice. The opposite party, by his counsel, might not be present at any subsequent term, to resist the application; nor could the Court remember always, with sufficient distinctness, the merits of the cause, so as to enable them to act understandingly in the premises. Without entering further into the argument, we must respectfully decline to hear the motion.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT HAWKINSVILLE,

JUNE TERM, 1850.

No. 70.—WILLIAM O'NEAL and another, claimants, plaintiffs in error, *vs.* CULLEN O'NEAL, administrator, &c. defendant.

[1.] The Clerk of the Superior Court, instead of retaining the original bill of exceptions, and sending up a copy, as required by law, sent up with the record the original bill itself: *Held*, that the matter could not be relieved by suggesting a diminution of the record. Motion for *certiorari* refused, and writ of error dismissed. *Query*, as to the constitutionality of the rule which authorizes the postponement of a cause for one term, upon a suggestion of a diminution of the record.

In error, from Laurens Superior Court. Tried before Judge HANSELL, March Term, 1850.

Suggestion of a diminution of the record. Motion to dismiss writ of error.

Counsel for plaintiff in error, in this case, suggested a diminution of the record, inasmuch as the Clerk of the Superior Court of Laurens County sent up to this Court the original bill of exceptions, instead of a copy of the same, and prayed that the original bill of exceptions might be withdrawn, and remanded with instructions to the Clerk of the Court below, to send up to the next term of this Court a copy thereof.

The defendant in error joined issue with a protestation, and

stitution-amending power of the State. The plaintiff in error is not favored, under the laws, by virtue of which we administer Justice. It was the intention of the Legislature to prevent, at all hazards, save Providential interference, delay of justice—that delay of justice, amounting to a denial in many cases, which is a just reproach to the corrective tribunals of England and of our sister States. Consequently, the greatest vigilance is imposed upon him. He is brought within very stringent conditions, with which he must comply at his peril. It is useless to argue before this Court, that these conditions are onerous and work injustice. Such appeals are appropriately made to the Legislature. I make these remarks to justify the farther remark, that we will allow a *certiorari* under our rule, only in cases clearly within it; for it is our purpose to carry out the policy of the Legislature, according to the Constitution and laws in which that policy is declared. Under what provisions of law are we called upon to grant the prayer of this plaintiff? On the 23d of February, 1850, the Legislature passed a law, in the third section of which it is enacted, "That where exceptions are filed in any case in the Superior Court, the Clerk of the Superior Court shall make out a copy of the bill of exceptions, and send it up to the Supreme Court, on or before the first day of the Court to which the writ of error is returnable, with the transcript of the record, and file the original bill of exceptions in his office, for the inspection of all parties interested." On the same day the Legislature passed another law on the same subject, determined, it would seem, to make assurance doubly sure, by a declaration of its will a second time, at the same session, and on the same day. This latter law enacts, "That the Clerk of the Supreme Court (the Legislature intended to say *Superior* Court) shall, in all cases, retain the bill of exceptions in his office, and send up a copy thereof to the Supreme Court, as a part of the transcript of the record, and no costs shall be charged in the Supreme Court for a copy of the bill of exceptions." *Pamphlet Laws of 1849-50*, pp. 68, 141.

These two Acts, so far as they apply to the motion now before me, do not vary in substance. In the former, the Clerk is required to *file* the original bill in his office for the inspection of all parties in interest, and send up a copy; in the latter, he is required to *retain* it and send up a copy. The *filing* and the *retaining*

mean one and the same thing, and are to subserve one and the same object. The Legislature meant, in both Acts, that the Clerk should *file and keep* the bill in his office, and the object of this filing and keeping, is to afford to the defendant in error, the means and opportunity of inspecting the bill, that he might thereby know and prepare for the grounds of error taken by the plaintiff.

Now, two things are, in the plainest possible way, required to be done by the Clerk. *First*, he is required to *file and keep*, (or retain) in his office, the *original bill*; and, *second*, he is required to send up with the transcript of the record, a *copy* of that original bill. Such are the requirements of these two Statutes. They were passed through all the forms of legislation, on the 23d day of February, 1850, and on that day they became the laws of the land, and obligatory upon the Courts of justice. They took effect from their date. Such is the judgment of this Court. (See case on this subject determined at Milledgeville in May last, *ante* p. 380.) They repealed the former law, which authorized the *original* bill to be sent up. The bill of exceptions in this case was certified on the 27th March, 1850—one month and four days after the passage of the new laws. This case, therefore, comes under the new laws, and is to be determined by their provisions. The Clerk has not sent up this case according to those provisions. *He has not retained in his office the original bill, nor has he sent up a copy of that bill.* The case is not, therefore, before us according to law. It is before us according to a law which is now a dead letter on the Statute book, because repealed. For relief against the consequences of a failure to comply with plain provisions of law, upon a suggestion that the Clerk has diminished the record, we are asked to permit the original bill to be withdrawn, to remand it back to the Clerk, and to instruct him to send up a copy of that bill. For several reasons these things cannot be done. Here are two laws which make it the duty of the Clerk of the Superior Court to retain the original bill, to enable the defendant to inspect it. *That* he has not done, and the defendant has not, in consequence, enjoyed the privilege which the laws give him of inspection. We are asked to allow to be done *now*, what the law requires to be done when the bill is certified—to allow the Clerk to *retain* the bill, *nunc pro tunc*, and this at the expense of a delay of one term. The reply is, that the laws of the State are binding upon this Court, if they are constitutional.

To grant the motion would be to annul the law—to grant the term to the plaintiff would be to annul the Constitution. We have no dispensing power. What the law makes the duty of the Clerk, it is the duty of this Court to require to be done, and to require it to be done at the time, and in the manner pointed out by the law.

If the original bill had been retained, and no copy sent up, it is possible that the case would then be within the rule for suggesting a diminution. But the insuperable difficulty is, that the original bill has not been retained below. That it shall be retained, is an imperious requirement of the Statutes. This view would seem to me to be conclusive.

If the original bill cannot be remanded and placed in the hands of the Clerk, *de novo*, from whence will he derive a copy? What is there on his files, or belonging to the record in the case, to be copied? Nothing whatever. The plaintiff in error does not complain of any defect in the record, except that the copy of the bill has not been sent up—he suggests no diminution in any other particular. He in effect admits, that as to all other particulars, the record is perfect. The Clerk, then, has sent to this Court the whole record as it stands before him. Wherein, then, does the diminution consist? Denying that part of the plaintiff's motion which asks that the bill be remanded, suppose we should grant it so far as to require the Clerk to send up a copy? In that event, the Clerk would be required to furnish us with a copy of a paper which is neither on the files nor the records of his office. He would be required to do an official impossibility. *Under the rule, then*, there has been, from the concessions of the plaintiff himself, no diminution of any part of the record. All the record is here which could be brought here.

If we should grant this motion, we place it in the power of the plaintiff in error, by the co-operation of the Clerk, in any case, to prevent a hearing at the first term, and in every case to defeat the constitutional requirement, that cases be tried at the first term.

Motion denied, and the writ of error dismissed.

NO. 71.—PETER H. COFFEE and others, plaintiffs in error, vs. JAMES F. NEWSOM, executor, &c. defendant.

- [1.] A denial in the answer from information and belief, is not sufficient to dissolve an injunction.
- [2.] Where the equity of an injunction bill is not charged to be within the knowledge of the defendant, and the defendant merely denies all knowledge and belief of the facts alleged therein, the injunction will not be dissolved on the bill and answer alone.
- [3.] It is a good answer to an application to dissolve an injunction upon bill and answer, that the equity of the bill upon which the injunction rests, is not known by the defendant, whether from ignorance or any other cause.
- [4.] The answer of the executor, that he was not privy to the fraud charged against the testator, and that he disbelieved the facts alleged in the bill against him from his confidence in his integrity, is not sufficient to dissolve the injunction to restrain proceedings at law in favor of the estate.
- [5.] In some particular cases, the Court will continue the injunction, though the defendant has fully answered the equity set up in the bill.

In Equity, in Pulaski Superior Court.

This was a bill in Equity, brought by the plaintiffs in error against the defendant in error, returnable to Pulaski Superior Court, and tried before Judge HANSELL, at the Term, 1850.

The bill charged that in August, 1843, the complainants, Peter H. and John B. Coffee, entered into a treaty with the defendant's testator, Batts Newsom, for the purchase of the entire settlement of lands then claimed to be owned by him in the Counties of Teitair and Pulaski; that in the progress of said treaty, and to induce them to make the purchase, the said Batts conducted them over, and showed them a large body of valuable lands, upon a part of which was located the former residence of said Batts, and various necessary and valuable out-buildings, &c. all of which he represented to them to constitute and belong to the said settlement. The bill goes on to specify the numbers of the lots of land, and the district in which they lay, which said Batts exhibited to complainants, and represented as forming the said settlement, and to which he had and could and would make good and sufficient lawful titles; that the complainants, Peter H. and John B. confiding in the good faith and integrity of the said Batts, in

describing and showing to them the said settlement of lands, and relying upon his representations as to their location, &c. and as to the legality and sufficiency of his titles thereto—the title papers to which he represented as being at his then residence in Randolph County, and which, therefore, they had no opportunity to inspect—were induced to enter into a contract for the purchase of said lands; and in pursuance thereof, they, with Wilcox, the other complainant, made and delivered to said Batts their two promissory notes, for \$1000 each—one to fall due on the 1st of January, 1844, the other twelve months thereafter; whereupon the said Batts then executed to them a “bond for titles,” in which he obligated himself to make, or cause to be made to the said complainants, good and sufficient titles to his possession of lands lying in the Counties of Pulaski and Telfair.

The bill farther charged, that at the time of the contract, to wit: in August, 1843, William Newsom, a son and a tenant of Batts, was in possession of the premises, and was to continue in possession until the 1st of January thereafter; that there was upon the premises, and embraced in the contract, a gin-house, with the usual appendages to the same, of the value of \$400; which said gin-house, (the said Batts having caused the gin to be carried away after the contract,) was, by the gross negligence of said Batts or his agents, burnt down and destroyed, &c.; that on or about the 1st of January, 1844, complainants went into the possession of the premises; that shortly thereafter, Batts furnished them with a memorandum or schedule of the said lands, which, as they were informed and believed, was in the handwriting of the executor, the defendant in error.

The bill farther charged, that said memorandum contained lots to which Batts had not then, nor at any other time, any title or color of title, and that it made no mention of other lots, which had been represented and shown to complainants as belonging to and constituting part of said settlement of lands; that said memorandum contained numbers for which they did not contract, and to one of which he never had any title; for that the same had been, for many years previous, owned and cultivated by the complainant, Wilcox; that other lots mentioned in said memorandum, complainants were informed and believed were owned and claimed by one John McDaniel and W. Melrose.

The bill farther charged, that it was not in the power of Batts,

in his lifetime, nor of his executor since his death, to make or secure to them legal and sufficient titles to the said settlement of lands: and that the lots and parcels of lands to which the said executor was wholly unable to make good and sufficient titles, were of essential importance and value to the said settlement, and the loss of which rendered the residue of said settlement of comparatively little value.

The bill farther charged, that the aforesaid representations of the said Batts, to induce them to purchase said settlement, he knew, at the time, were false in the foregoing particulars.

The complainants offered to said Batts in his lifetime, and to his executor since his death, to pay the notes upon receiving good titles, after deducting therefrom the value of the gin-house, &c. with which they refused to comply.

There were other charges made in the bill, which it is not necessary to mention.

The bill showed the subsequent death of Batts Newsom, and the qualification of his executor.

The complainants in the bill were sued upon the notes, and the cases were pending upon the appeal. The bill concluded with a prayer, that the Court would decree a rescission of the contract; or if it should appear that defendant could make good titles, that they might be allowed the amount of the damages sustained by them, as a deduction from the amount of the notes.

The defendant, by his answer, admitted that his testator and Peter H. and John B. Coffee entered into a contract as evidenced in writing, and which is set forth in the bill, in reference to the purchase of the settlement of land lying in, Pulaski and Telfair Counties, but rejects the idea that his testator made any false representations as to the quality, location, boundary or title of the land sold. He had no knowledge of what preceded the contract, but presumes it embodies the understanding of the parties. The defendant appended a schedule to his answer, containing a list of all the lots and parts of lots constituting the possession of land sold by his testator to complainants, as far as he has any knowledge, information or belief. Defendant admitted that the memorandum or schedule, furnished the complainants by his testator, was prepared by him at his testator's request, who could not write; that it was prepared with the title deeds before him, but

upon subsequent examination he found it was not accurate, and contained several mistakes.

Defendant admitted that the gin-house and running geer were burnt, as also the gin, which was not carried off as charged in the bill; but denies that it was the result of gross negligence of his testator or of his agent.

In regard to the exhibition of the lands sold to the complainants by the defendant's testator, the defendant denied knowing any thing, except "his testator told him that when he rode into the fields in cultivation with them, he was ashamed to show them, as they had been so badly cultivated by his son in charge of the premises; farther than this, he had neither knowledge or information."

The defendant admitted that the complainants had offered to pay the notes to him, if he would make a deduction for the destruction of the gin-house; but denied that they said any thing about the titles to the land, or any part thereof.

The defendant admitted the death of Batts Newsom, and his executorship; that suits had been instituted upon the notes.

Defendant could not answer as to the sufficiency of the titles in his custody, or which came to his possession, farther than that he considered them valid.

At the October Term of said Court, 1847, counsel for defendant moved to dissolve the injunction, upon the ground that the answer of the defendant denied the equity of complainants' bill.

At the April Term, 1850, the motion was heard and sustained, and the following order was passed by the Court: "It is in consideration of the fact, that the answer of the defendant is as full and as responsive as his representative character will enable him to make; as, also, that there is no sufficient reason apparent to the Court for retaining any longer said injunction, *Ordered*, that the same be dissolved."

To which said ruling and decision of the Court, counsel for plaintiff in error excepted, and has assigned error.

COLE and DONNELLY, for plaintiff in error.

I. L. HARRIS, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

An injunction was obtained in this case, upon the fraud charged against the testator of the defendant. Is the answer of the executor, who admits his ignorance as to the principal allegations in the bill, but expresses his belief that they are untrue, sufficient to dissolve the injunction?

Believing that in the decisions of Courts, as well as the arguments of counsel, the chief of all perfections is, to be plain, pertinent and brief, I shall endeavor, in the present instance, to conform my practice to my principles.

[1.] We understand the general rule to be, that a denial in the answer from information and belief, is not sufficient to dissolve the injunction. *Apthorpe vs. Comstock*, 1 *Hopkins*, 148. *Ward vs. Van Bokkellen*, 1 *Paige*, 100. *Poor vs. Carleton*, 3 *Sumner*, 78.

[2.] And that where the equity of an injunction bill is not charged to be within the knowledge of the defendant, as is the case before us, and the defendant merely denies all knowledge and belief of the facts alleged therein, the injunction will not be dissolved on the bill and answer alone. *Rodgers vs. Rodgers*, 1 *Paige*, 426. *Quackenbush vs. Van Rosser*, 1 *Saxton's N. J. R.* 476. *Fulton Bank vs. New York & Sharon Canal Co.* 1 *Paige*, 311.

[3.] And it is always a good answer to an application to dissolve an injunction upon bill and answer, that the equity of the bill, upon which the injunction rests, is not denied by the defendant, whether from ignorance of the facts or any other cause. *Wulkinson vs. Gillespy*, 5 *Paige*, 112.

Rodgers vs. Rodgers, *supra*, was a bill filed against the personal representatives, to restrain proceedings at law, on notes given to the testator. The equity of the bill on which the injunction was granted, was not charged to be in the knowledge of the defendants, and they put in an answer denying all knowledge or belief as to the principal facts on which it rested; and the Chancellor held, that in such a case, the injunction could not be dissolved on the bill and answer alone. This case is, in every feature, the one at bar.

[4.] *Roberts vs. Anderson*, (2 *Johns. Ch. R.* 202,) is also similar to it. There the bill charged fraud in the title to the premises

in controversy, and the injunction was issued to restrain the defendant from proceeding at law. All the denial contained in the answer was, that the defendants were not privy to any fraud; and that they believed the conveyance was good. But Chancellor Kent said, "This is leaving the question of fraud as unsettled as when the answer came in. *It is true, the defendants may have given all the denial that is in their power*, but the fraud may exist notwithstanding, and consistently with their ignorance, or the sincerity of their belief. It appears to me, then, that until the cause is brought to a hearing and decided on the merits, the injunction ought not to be dissolved, and that the case does not fall within the reason of the general rule, that an injunction is to be dissolved when an answer comes in and denies all the equity of the bill."

What, I ask, is the sum of the defendant's answer in the case before us? It is, that he *disbelieves* the material allegations in the bill, but that he *knows not* whether they are true or false; that they relate not to his own acts, but to those of his testator; that he was no party to the material transactions, but, on the contrary, a stranger to them. This surely can constitute no good foundation for a motion to dissolve the injunction. The bill and answer may both be true, and still the controversy be not in any wise affected. The contract with the testator may have been grossly fraudulent, and yet the present defendant, in good faith, not only aver his ignorance of the fact, but his total disbelief of it, from his entire confidence in the integrity of his testator.

[5.] In some particular cases, the Court will continue an injunction, though the defendant has truly answered the equity set up. 2 Ves. 19. *Wyatt's P. R.* 236. The injunction, then, ought not surely to be dissolved under the circumstances of this case.

Cravy vs. Rawlins.

of the said Elizabeth G. Cravy, herself, her heirs, executors and administrators, jointly and severally, firmly by these presents.

"In witness whereof, I, the said Elizabeth Paramore, hereunto set my hand and affixed my seal, this day and date first above written.

"ELIZABETH ^{her} X ~~PARAMORE~~ mark.

"In presence of us LIMNY ^{her} X DODSON, mark.

JOHN P. DODSON."

The bill alleges, that on the 18th day of September, 1838, Elizabeth Paramore intermarried with James W. Rawlins, the defendant in error, "who thereby became possessed as for the term of the natural life of his said wife, and still continues in possession of the said slaves. The bill alleges, that since the period of the making of the "deed, gift or conveyance," four children had been born unto the said negro woman, Patience.

The bill charges that the plaintiff in error is apprehensive that the negroes will be removed beyond the limits of this State, by James W. Rawlins, and that the rights of Elizabeth G. Cravy will be seriously impaired, unless the remedy be provided for the preservation thereof. The bill prayed that the "writ of *ne exeat quia timet*, or such other writ as the equity of the case may require," might issue to restrain James W. Rawlins from removing the property beyond the limits of this State, and to give good and sufficient security, residing in the County of Telfair, that the property shall be subject and accessible to the demand of the plaintiff in error, on behalf of Elizabeth G. Cravy.

Upon filing the answer of defendant, in which he admitted the execution of the instrument by Elizabeth Paramore, and the possession of the property by himself, counsel for the defendant moved to dismiss the bill for want of equity apparent on its face.

The motion was sustained by the Court, and the bill was dismissed; whereupon, counsel for plaintiff in error excepted to the decision of the Court below, and assigned error.

J. J. SCARBOROUGH and FISH, for plaintiff.

COLL, for defendant.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT AMERICUS,
JULY TERM, 1850.

No. 73.—JOSEPH JOHNSON, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] The Act of 1847, to prevent white people from gambling with negroes and free persons of color, creates the offence in three different forms.

1st. Playing and betting with a negro or free person of color, by those engaged in the game, is an offence.

2d. Also, playing *without* betting, on the part of those engaged, but with the purpose that others may bet; and

3d. Betting on a game played by others.

[2.] Playing, *per se*, without betting by those who play, and without the intent or purpose that others may bet, is not an offence under the Act of 1847.

[3.] Query. Whether proof of playing alone will create a presumption of guilt, so as to put the accused upon proof, that the playing was without betting, and without a purpose or intention that others might bet?

Gambling with a negro, in Macon Superior Court. Tried before Judge WARREN, February Term, 1850.

The indictment in this case, charged the defendant with "the offence of playing with a negro at a game of cards." For that the defendant, on a certain day specified, "did play at a game of cards with a negro slave" named, "for the purpose of winning or losing money or spirituous liquors, contrary to the laws," &c.

The defendant, on the trial, moved to take a verdict, on the

Act; that it was necessary to allege and prove that money or other thing or things, article or articles of value was bet and staked upon said game, either by the parties engaged at play, or some other person or persons;"

2d. "That if the specific article or thing played and bet for, lost or won upon the game, was not alleged in the bill of indictment, and proved as therein laid and alleged, the defendant could not be found guilty." The Court declined so to instruct the Jury, but did instruct them, "that if they believed, from the evidence, that the defendant played a game or games of cards with the negro—whether played for money or any other thing or things of value or not—they would find him guilty."

The refusal to charge as requested and the charge as given, are assigned for error.

[1.] The Act of 1847, by its title, is an Act to prevent gambling with negroes or free persons of color, by white persons. Our opinion is, that it creates the offence in three different forms.

1st. Playing and betting with a negro or free person of color, by those engaged in the game.

2d. Playing without betting, on the part of those engaged, but with the purpose and intent that others may bet upon the game.

3d. Betting on a game played by others.

The Act is miserably drafted, but the construction, as above, is inferable from it, and we think, gives full effect to the intent of the Legislature. That intent is to suppress the demoralizing and impolitic practice of gambling with slaves or free persons of color. Gambling, generally, is gaming for money. In this Act, gambling is playing with cards, dice or any other game of chance or hazard, "*for the purpose of betting, winning or losing money, or any other thing or things, article or articles of value or otherwise, or any property, or any other article or articles, thing or things of value.*" It consists also in playing at these games, that others may bet, win or lose money or any other thing or things, &c; and in betting, winning or losing money or any other thing or things, &c. whilst others play the game. See, *Pamphlet of 1847, p. 105.*

[2.] This construction excludes the idea that playing, *per se*, without betting on the game, or without any intent or purpose that others may bet, is an offence. A game at cards, or any other game of chance or hazard, with a negro or free person of color,

Johnson vs. The State of Georgia.

simply for amusement, without more, is not made an offence by the Act, however vulgar and debasing it may be.

Now, the charge of the Court, *that if the defendant was proven to have played with the negro—whether he played for money or any other thing or things of value or not, he was guilty*—seems, at first view, in conflict with this view of the Statute, and to warrant the exception. Not so, however, if carefully considered; for he may be guilty, although he does not play himself for money or other thing. He may play and bet not at all, yet play that others may bet. He may be guilty under the second form, in which—as stated above—the Act defines the offence.

2. The Act of 1847 further defines the mode of proof on the trial. By the 2d section, it is declared, "that on the trial of all indictments for said offence, the prosecution shall not be required to prove the game or games played, but shall be required to prove the playing or betting only." The last clause, in terms, sends the case to the Jury on proof of playing, and makes the other ingredient in the offence, an inference from that fact; which inference, the accused must rebut at his peril—that is, if his playing was without betting, and without a purpose that others may bet—merely for amusement—he must show it in defence. The 2d section will bear this construction, but I must say that I am not fully satisfied with it; for I am not sure but that the generality of the last clause in the section is limited and restrained by the first clause. The construction is, however, in accordance with the policy of the Act, and may be justified by the difficulty of proving the offence at large. The same policy and the same necessity dictated the enactment, that the presence of a slave in a ripting shop within certain hours, or on the Sabbath day, shall be presumptive evidence of selling spirituous liquors to him, against the law. *Hawkins*, 771. These views dispose of all the assignments which relate to the charging, and refusal to charge, of the Court.

A motion was made to quash the indictment, because it does not allege that any specific sum of money, or any other specific article, was bet or staked on the game. This was not necessary. For it is not necessary, as we have seen, that the accused should bet at all. The indictment, moreover, charges the playing, and *for the purpose of winning or losing money or spirituous liquors, contrary to law*. At Common Law, the indictment would be held

wanting in distinctness and certainty, but it is sufficient under our statute, for it describes the offence so plainly, as to make it intelligible to the Jury.

Let the judgment be affirmed.

No. 74.—JAMES S. HOLLINGSHEAD, administrator, &c. plaintiff in error, vs. HARDY MCKENZIE, defendant.

[1.] If a bill is filed to enforce a parol agreement respecting lands, and the defendant, in his answer, admits the contract, without insisting on the Statute of Frauds, the Court will decree a specific performance, upon the ground, that the defendant has renounced the benefit of the Statute. But if the defendant should, by his answer, admit the parol agreement, and yet, insist upon the benefit of the Statute, he will be entitled to it, notwithstanding such admission.

[2.] It is not enough that there is a remedy at law to make the judgment at law a bar. It must be shown, not only that the matter alleged in the bill might have been set up by way of defence, but that it would have been as practical and as efficient to the ends of justice, and its prompt administration, as the remedy in Equity.

[3.] Where a creditor receives a deed to a tract of land, as collateral security, for the payment of a note, which is to be given at a future time, and the creditor dies before the note is given, and the consideration for the deed thus entirely fails, it would be fraudulent, in the administrator of the creditor, to retain the deed, when the object, for which it was given, had entirely failed, without fault on the part of the grantee; and Equity will order the instrument to be delivered up to be cancelled.

In Equity, in Macon Superior Court. Decision on demurrer, by Judge WARREN, March Term, 1850.

Hardy McKenzie, by his bill, alleged, that about the 14th February, 1842, he and one John M. Greer became sureties for one Warren Dykes, on three promissory notes, to one Miles K. Harman; that in 1844, he (McKenzie) made an agreement, verbally, with Harman, that Harman should give up the three notes, and

Hollingshead vs. McKenzie.

take in full thereof the individual note of Dykes; in consideration of which, McKenzie agreed to give, as collateral security for the new note, a deed to one half of a tract of land in Macon County. In pursuance of this agreement, the deed was made and delivered to Harman, but from various causes, Harman failed to execute his part of the agreement, and died, holding the three notes still in his possession. Since his death, his administrator had recovered judgment on the notes, and the same had been paid up by McKenzie. The bill prayed that the deed might be given up to be cancelled.

Demurrer. 1st. For want of equity; 2d. That the parol agreement cannot be proved to vary an absolute deed; and 3d. Complainant should have made defence to the notes sued.

The Court overruled the demurrer, and defendant excepted.

GILES and WARREN, for plaintiff in error, cited—

Miller vs. Cotten, 5 Ga. Rep. 346, 347. *Robson vs. Harwell and Wife*, 6 Ga. Rep. 595. *Irahan vs. Child*, 1 Bro. Ch. 93. *Acts of 1837*, pass. 111. *Hotchkiss*, 589. 1 *Greenl.* §§276, 289. 7 *Bac. Abr.* 244, '5. *Moss vs. Riddle*, 5 *Cranch*, 351. 2 *Smith's Lead. Cas.* 327, 30. *Maxwell vs. Connor*, 1 *Hill's Ch. R.* 22. *Bostwick vs. Perkins et al.* 1 *Kelly*, 139.

S. MILLER and R. P. HALL, for defendant, cited—

Roberts on Frauds, 155, '6, 130, 78. 1 *Bland's Ch. R.* 248, 288. *Story's Eq. Pl.* §763. 2 *Bland*, 261. 8 *Ga. Rep.* 245. 1 *Kent*, 464. *Chitty on Contracts*, 741. *Boyce, executor, vs. Grundy*, 3 *Peters*, 10. *Bac. Abr.* 199. 1 *John. Cas.* 155. 3 *John.* 216. 11 *John.* 96. 6 *Ga. Rep.* 614, 623. 2 *Kelly*, 420. 4 *Conn.* 276. 2 *Penn.* 492.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The complainant insists on his right to discovery, for the reason that the defendant, by his answer, may admit the parol agreement. But what of that, if he claims the benefit of the Statute? It would be utterly nugatory; for whatever doubts may have once existed, it is now well settled, that if the defendant should, by

his answer, admit the parol agreement, and should insist on the benefit of the Statute, he will be fully entitled to it, notwithstanding such admission. *Story's Eq. Pl.* §763.

[2.] It is contended, that as judgment has been obtained in a suit at law, against McKenzie, on the notes, in which the matter alleged in this bill, may have been set up by way of defence, that Equity has no jurisdiction. 3 *Merivale's Rep.* 225, 226. *Chitty on Contracts*, 113. *Sugden on Vendors*, 129.

But the true rule, we understand to be this—that it is not enough that there is a remedy at Law to make such a plea a good bar to a proceeding in Chancery—it must be shown that it was as practical and as efficient to the ends of justice, and its prompt administration, as the remedy in Equity. Besides, frauds and trusts are peculiarly within the jurisdiction of the Chancery Courts. 1 *Mad. Ch.* 262. 3 *Cranch*, 280. 9 *Ves.* 21. 1 *Jacob & Walker*, 19. 5 *John. Ch. Rep.* 174. 2 *Conn.* 129. 2 *John. Ch. Rep.* 596. 6 *Munf.* 283. 4 *Penn. Rep.* 131. 3 *Peters' Rep.* 210.

[3.] On the main question, as to whether McKenzie is entitled to have the deed which he made to Harman in his lifetime, delivered up to be cancelled, the view we take of it is this—the note of Dykes, the principal debtor, was to have been substituted for the three notes of Dykes, McKenzie and Greer, and the deed to the land given as collateral security. The conveyance was executed, but Harman retained the original notes, in order to ascertain, by calculation, for what amount the new note should be taken, and died before the arrangement with Dykes was consummated. Hollingshead, his administrator, finding the old notes amongst the papers of his intestate, has sued for and collected the money due thereon. Here, then, the deed which was originally valid, has, by subsequent events, to wit: the payment of the indebtedness, become *fructus officio*. It is a nullity to all intents and purposes, and a Court of Chancery will interpose in the administration of a protective or preventive justice, and decree a delivery and cancellation of the instrument. The case of *Inock vs. Steyvesant*, (2 *Paige's Rep.* 84,) was very similar to this. There, absolute deeds were made, but for the purpose of effecting certain objects not specified on their face. The objects contemplated by the parties were prevented by an Act of the Legislature; and a bill was filed for a re-conveyance, as in the present instance, which was decreed with costs; and Chancellor Walworth lays down this

broad principle, which he asserts is constantly acted upon, subject to such limitations and restrictions as are necessary to protect the rights of *bona fide* purchasers and others, who have superior equities, namely: that where, from any defect of the Common Law—want of foresight of the parties, or other mistake or accident, there would be a failure of justice—it is the duty of a Court of Equity to interfere and supply the defect, or furnish the remedy.

Judgment affirmed.

No. 75.—THOMAS S. JOHNSON, administrator, &c. plaintiff in error, vs. NATHAN G. LEWIS, defendant in error.

[1.] Upon an issue founded on an affidavit of illegality, filed by an administrator, *de bonis non*, with the will annexed, to a general judgment against the precedent executor to the will, which was levied on the property of the estate in the hands of the administrator: *Held*, that legatees, under the will, who have been paid their legacies, are competent witnesses, when called for the administrator.

Certiorari, Macon Superior Court. Decided by Judge WARREN, March Term, 1850.

The only point in this case arose upon the trial of an issue in a Justices Court, formed upon an affidavit of illegality, interposed by Thomas S. Johnson, administrator, *de bonis non*, of Elias Jourdan, deceased, to an execution founded on a judgment against the former executrix, whose letters abated upon marriage with Johnson.

The administrator offered as witnesses two of the legatees under the will of Elias Jourdan, deceased, who being objected to, on the ground of interest, the administrator executed to them a release, relieving them from all liability to him on account of the debt; and the legatees executed a release to the administrator of all claim upon the estate of Jourdan. The administrator, *de bonis non*, was proven to be solvent. The witnesses had received

from the estate a portion of their legacy, since the rendition of the judgment.

The Justices decided that the witnesses "might be examined, but that the Court would regard their testimony in the light of interested witnesses." The witnesses were withdrawn, and exceptions filed. On writ of certiorari, sued out, Judge Warren sustained the decision, and an appeal is taken to this Court.

GILES, for plaintiff in error.

WARREN, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] The question made is, whether the legatees, offered as witnesses, are competent. There was a judgment, generally, against the executor of the will of Elias Jourdan, deceased, which was levied upon property of the estate in possession of the plaintiff in error, as administrator, *de bonis non*. He interposed an affidavit of illegality. Upon the trial, two of the legatees, under the will of Elias Jourdan, were offered as witnesses by the administrator, *de bonis non*, with the will annexed. It was in evidence that these legatees had in possession property received from the estate of the testator, since the judgment was rendered. Releases were executed by them to the administrator, *de bonis non*, and by him to them. Under these circumstances, the witnesses were excluded, virtually—the magistrates admitting them, but ruling them at the same time interested. Upon that ruling, sustained by the Judge of the Superior Court, the exception was taken.

We exclude at once all consideration of these releases. They could not in any degree affect the rights of the plaintiff in execution. If the witnesses were incompetent from interest, no arrangement between them and the party calling them, could restore their competency.

Were they interested? They were, beyond question. But it remains to be ascertained what the character of that interest is—if it is immediate and direct, they are incompetent, if remote and contingent, they are competent. The character of their interest depends upon principles, which I shall briefly state. To the judgment, there was no defence made—it is a judgment, generally,

No. 76.—FREDERICK BAREFIELD and others, plaintiffs in error,
vs. ISAAC BRYAN, defendant.

[1.] It is competent for all Courts to correct errors and mistakes in their own minutes, whenever the same is brought to their notice, provided the rights of third person, be not prejudiced.

[2.] Where a cause has been continued, and at the same term, the plaintiff tenders a confession of judgment for costs, which the defendant refuses to accept, or the Court to allow, on the ground that the case had been continued, but the confession was, nevertheless, entered by the Clerk on the minutes, by the direction of the plaintiff's Attorney: *Held*, that the confession is a nullity.

[3.] A suit may be dismissed after a continuance at the same term, or during vacation.

Certiorari, in Randolph Superior Court. Decided by Judge WARREN, April Term, 1850.

Isaac Bryan commenced suit in the Inferior Court of Randolph County, against Frederick Barefield and others, as administrators of L. Barefield. At the trial term, on motion of defendants, the cause was continued; after the continuance, plaintiff's attorneys wrote out a confession of judgment to the defendants for costs, with liberty of appeal; which confession, defendants refused to accept, and the Court refused to allow, upon the ground that the case had been continued for the term. By direction of plaintiff's attorney, the confession of judgment was entered upon the minutes by the Clerk. Subsequent to the continuance, at the same term, the plaintiff's attorney dismissed his case, which dismissal was entered on the docket, but not upon the minutes.

At the next succeeding term of the Court, an order was granted, reciting the foregoing facts, and adjudging the confession of judgment to be null and void, and that the case stand dismissed, as of the last term.

To this order, defendants below filed written exceptions, and upon them sued, out a writ of *certiorari* to the Superior Court. Upon hearing the *certiorari* and return, Judge WARREN overruled and dismissed the same; and this decision is assigned as error.

DEVON, for plaintiff in error, cited the following authorities:

1 *Greenlf. Evid.* §§522, 523. 3 *Phil. Evid.* 825, 834, 951, 826,

Barefield and others vs. Bryan.

896, 989, 995. 1 *Kelly's Rep.* 137, 138, 139, 278, 280, 475, 355.
 2 *Ib.* 275, 329, 231, 236. 3 *Ib.* 78. 4 *Ib.* 48, 47, 50, 159, 101.
 5 *Ga. Rep.* 527, 531, 485. 6 *Ib.* 175. 7 *Ib.* 191. 2 *Bailey*,
 263, 267. 4 *Cranck*, 241. 4 *Term R.* 281. 8 *Ib.* 542. 1 *Jacob's*
Law Dict. 411, 412, 413. 3 *Ib.* 5 *Ib.* 527, 396, 397, 398, 399.
Bla. Com. 169. 3 *Ib.* 21, 22, 331. *Tidd's Pra.* §§397, 398, 402.
 2 *Chit. Pr.* 221, 219, 353, 354. *Acts of 1838*, p. 14, 54. *Cobb's Ann.*
 38. 14 *Com. Law Rule.* *Broom's Legal Maxims*, 262, 262, 97,
 71, 102, 200. *Prince's Dig.* 910, 432, 428, 172, 184, 175, 174,
 428, 437, 438.

PERKINS, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

Suit having been instituted in the Inferior Court of Randolph County, by Isaac Bryan against the Barefields, on a judgment from Hancock County, the defendants at the trial term, moved for a continuance, on account of the absence of material testimony; which was allowed by the Court. The plaintiff then tendered to the defendants a confession of judgment for costs, with liberty of appeal, which they refused to accept, and which the Court would not sanction. The confession was, nevertheless, entered on the minutes of the Court by the Clerk, by direction of Bryan's counsel. The plaintiff then dismissed his action; but the order of dismissal was not put on the minutes, but was noted on the bench docket. At the ensuing term, the attorney of the plaintiff presented a motion, reciting all the foregoing facts, and praying to have the order of dismissal entered *nunc pro tunc*. This application was granted. A *certiorari* was sued out to the Superior Court, to correct the error alleged to have been committed by the granting of this order, and the judgment having been affirmed by the Superior Court, a writ of error is presented to this Court.

[1.] Counsel for the plaintiff in error insists that the power of correcting errors does not belong to the Superior Court. Concede this—this is no attempt to exercise any such jurisdiction. The granting of the order was merely to supply its own omissions—to perfect its own minutes—to do that, at the July Term, 1849, which should have been done at the preceding term.

[2.] The main ground relied on by counsel is, that the entry on the minutes of the judgment of confession, with liberty of appeal, when no appeal was prosecuted, is a final disposition of the case, and precluded any further proceedings in the premises.

In the opinion of this Court, that judgment was a nullity. It was not only done without the permission of the adverse party, but in the face of the decision of the Court refusing it. It is, therefore, no judgment; and its entry on the minutes, under these circumstances, can give it no validity.

[3.] But it is said, that if the confession of judgment came too late, the cause being continued, so also did the dismissal. But a motion to dismiss was not only in order at any time during the term, but a party is authorized by Statute to dismiss his action even in vacation, after the Court has adjourned. *Acts of 1843, page 122.*

Again, it is argued, that the application to correct the minutes came too late. The law fixes no limit—it is difficult to prescribe one, provided the rights of third persons be not prejudiced. Whenever a Court is satisfied that its records are not in truth what they should be, and what, in legal contemplation, they are supposed to be—the memorial of its judicial action—they should be made so. By refusing to the plaintiff the order, his rights would have been forever barred; whereas, by sanctioning it, it only places the parties where they were. The first writ being dismissed, if it is never renewed, the defendants cannot be hurt. Should it be recommenced, however, they will be entitled to avail themselves of any defence which originally belonged to them. It is obviously, therefore, in furtherance of justice, to affirm the concurrent judgments of the other two tribunals.

No. 77.—ROBERT G. FORD, plaintiff in error, *vs.* WILLIAM W. TISON, administrator, *de bonis non*, &c. defendant in error.

[1.] A files his bill, charging that he is the owner of four shares in an estate represented by the defendant B; that he became the purchaser at public sale, of property belonging to that estate, for which he gave his notes, with an understanding with the then executrix, that they should be paid by allowing him the aforesaid shares; that suit has been instituted and judgment had on the notes, which is now proceeding against him, and praying that the judgment be enjoined and the agreement enforced, by allowing to complainant the amount of his four shares as a credit on it: *Held*, that upon the answer distinctly denying that the estate owed the complainant any thing, and stating that the four shares claimed in the bill have been paid to him, the injunction was very properly dissolved.

In Equity, in Dooly Superior Court. Decision on motion to dissolve injunction, by Judge WARREN, May Term, 1850.

Theophilus Williams, by his last will, directed certain property to be kept together, until his youngest son should arrive of age, at which time he directed it to be divided among his children.

Robert G. Ford, by a bill filed by him, alleged that he was the purchaser of the shares of four of the children; that at the time the youngest son arrived of age, the executrix, Mary Williams, caused a public sale of the property, for the purpose of distribution; that he became the purchaser of a portion of the property, and gave his notes therefor; that the executrix agreed with him to hold the notes until a settlement, and then apply them as a payment towards the shares he had purchased of the distributees; that contrary to this agreement, Mary Williams, as executrix, sold a portion of the notes, and sued and recovered judgment upon the others. The bill alleged, that Mary Williams had died, and Tison had been appointed as administrator, *de bonis non*; that he was threatening to enforce the executions without accounting for the balance due on the distributive shares owned by him. The bill prayed an account and injunction.

The answer of Tison, administrator, denied all knowledge of the alleged agreement, and stated his belief, that none such ever existed. The answer denied any liability to account to Ford—he having received the full amount due to him. His receipt was appended as an exhibit. Upon the coming in of the answer, a

motion was made to dissolve the injunction, on the ground that the equity of the bill was sworn off. The Court granted the motion, and complainant excepted.

H. HOLT, representing HINKS & HINES, for plaintiff in error.

P. J. STROZIER, for defendant.

By the Court.—NIBBET, J. delivering the opinion.

[1.] The Court below dissolved the injunction in this case upon the coming in of the answer. The plaintiff in error excepts, alleging that the equity of his bill is not sworn off. He insists that the answer is insufficient, further, because the defendant answers upon his information and belief, when it is indispensable that he should answer according to his knowledge. As to the latter idea, I remark, that this Court has held that a bare denial or affirmation of a material allegation upon information and belief, is not sufficient upon a motion to dissolve an injunction, even when the defendant is sued in a representative character. The complainant charges, that he became the purchaser of four shares in the estate which defendant represents, that he also became the purchaser of the property of the estate to the amount of twelve hundred dollars, or about that sum, and gave his notes for the same; that it was agreed between himself and the executrix to the will, which the defendant now represents as administrator, *de bonis non*, with the will annexed, that these notes should be settled by an allowance to him of the amount of the four shares which he owned in the estate; that the judgment, which is proceeding against him, is founded on the notes which he gave for the property, and he prays that it may be enjoined, and that the defendant account and settle with him according to the contract which he made with the executrix. This is the complainant's case. The answer denies any knowledge of the contract, and the defendant states, that upon his information and belief, there never was any such contract, and proceeds to give reasons and facts for this belief. It is not necessary to determine whether, upon this point, the answer is full enough to dissolve the injunction, because, in other respects, it completely and unequivocally denies the complainant's equity. The complainant charges that the es-

tate represented by the defendant, is indebted to him in the amount of the four shares which he bought. It is to cause this amount to be offsetted in pursuance of the alleged contract, that the bill is filed and the injunction asked. Without this indebtedness, he has no case; his equity, if he has any, grows out of this fact. This fact is distinctly charged. Now this fact is positively denied in the answer. It states that he has received the whole of his four shares. Its denial is not put upon the information or belief of the defendant, but is made without any sort of qualification, and the receipt of the complainant is appended as an exhibit. This denial is directly responsive to the bill. It strikes at the root of the complainant's equity, and leaves his injunction nothing upon which to stand.

Let the judgment be affirmed.

NO. 78.—RICHARD A. LANE, plaintiff in error, vs. THOMAS MORRIS, defendant in error.

- [1.] Under our judiciary, after a general demurrer has been filed and argued, and the judgment of the Court pronounced thereon, it is not proper to allow it to be withdrawn.
- [2.] Where, from the inquiry which has been made, it is probable that a book of original entries has been lost or destroyed, and the party swears that it is not in his power, custody or control, secondary evidence is admissible.
- [3.] Where stockholders in a bank are personally liable for the *ultimate* redemption of its bills; to a suit by a bill-holder against a stockholder, a plea that the bank has assets which have not been appropriated, without specifying what they are, is demurrable for uncertainty.
- [4.] Where the charter of a bank renders the stockholders liable, after a transfer of stock, unless sixty days' notice of the sale is given in one of the public gazettes of the State, and provided the transfer is made six months before the failure of the corporation, all stockholders who have given notice in terms of the Act, are exempt, unless the failure occurs within six months thereafter. All other stockholders are liable for the redemption of the bills, whether they have transferred or not. This liability is not *primary* nor *total*, but *secondary* and *proportional*.

Lane vs. Morris.

- [5.] The notice of the sale by the stockholder, need not specify the name of the purchaser.
- [6.] A suspension and failure to pay specie on demand to bill-holders, generally, is sufficient to enable the bill-holder to sue. He need not prove a special demand in his case.
- [7.] The right given the bill-holder to go upon the stockholder for the ultimate redemption of the bills, is independent of any claim upon the assets of the corporation—one which may be asserted directly in his own name, and which the assignee or receiver could not enforce, as it constitutes no part of the effects of the bank.
- [8.] *Scilicet*; that where an action is founded on a Statute, the law deems it for this purpose a *specialty*, and consequently, the plea of the Statute of Limitations, as applicable to *notes*, cannot be supported.

Debt, in Muscogee Superior Court. Tried before Judge ALEXANDER, May Term, 1850.

This was an action by Richard A. Lane, as a holder of bank bills of the Planters & Mechanics' Bank of Columbus, against Thomas Morris, a stockholder in said Bank, to recover on his *pro rata* liability for the payment of the bills, under the following section of the charter.

"Sec. xi. The persona and property of the stockholders, shall be pledged and held bound in proportion to the amount of shares, and the value thereof, that each individual or company may hold in said bank, for the ultimate redemption of the bills or notes issued by said bank, in the same manner, as in common actions of debt, and no stockholder shall be relieved from such liability by sale of his stock, until he shall have caused to have been given sixty days' notice in some public gazette of this State."

The declaration alleged a judgment against the assignee of the bank, and a return of "*nulla bona*." On the trial, defendant's counsel demurred to the declaration. The Court overruled the demurrer; whereupon, defendant moved to withdraw his demurrer. The Court granted the motion, and this is the first ground of error assigned.

Plaintiff's counsel then moved to strike out the 5th, 7th, 9th, 10th and 11th pleas of defendant, which were in substance, as follows: The 5th plea set forth, that if defendant ever was a stockholder, all his rights and liabilities, except so far as saved and reserved by statutory provision, had long since ceased and

been determined by the forfeiture of the charter of said bank, viz: on 13th June, 1843, as appears by the judgment of the Court declaring the forfeiture. The 7th plea set forth, that the bank "was not insolvent at the time the plaintiff commenced his action, and is not now insolvent, but that the same has property and assets, which have not been exhausted by the plaintiff, and that defendant, as stockholder, is not liable until such insolvency does actually exist."

The 9th plea was, that defendant was not one of the original stockholders and subscribers to the bank, but was the assignee of Hampton S. Smith, one of the original subscribers, who, upon the transfer, gave no notice of the sale.

The 10th plea was, that defendant was not a stockholder at the time the bills were issued, on which suit was brought, and that no notice of the transfer to the defendant had ever been given in any public gazette.

The 11th plea was substantially the same as the 9th and 10th.

The Court overruled the motion and sustained the pleas, and this decision is another ground of error assigned.

Defendant's counsel proposed to prove, by parol, the names of the original subscribers. The Court decided the book of minutes to be higher evidence. Defendant's counsel then proved by Wm. Dougherty, Esq. plaintiff's attorney, that he had the book in his office until the summer of 1849, when Dr. Flewellen called for it, with an order from the assignee of the bank, and obtained it; that he had traced it into the hands of Mr. Kemp, counsel for Dr. Flewellen, who said he had left it in the office of Col. Holt. Col. Holt proved that he had not seen it in his office, and knew it was not there. The assignee of the bank stated he had never seen it since delivered to Dr. Flewellen. Defendant stated it was not in his power, custody, or control, but that he had made no search or inquiry for it. The Court held the book sufficiently accounted for, and admitted the parol evidence, and this decision is assigned as a ground of error.

Counsel for the defendant then offered a public gazette published in the City of Columbus, showing the following notice:

"*Notice.*—I have transferred all of the stock I held in the Planters & Mechanics' Bank of Columbus, September 1st, 1841.

(Signed,) THOMAS MORRIS."

Objected to by plaintiff's counsel, as insufficient, in not stating to whom transferred.

The Court overruled the objection, and this decision is assigned as a ground of error.

The Court charged the Jury, that the plaintiff had mistaken his remedy, in bringing suit in his own name, but under the Acts of 1842 and 1843, the action ought and could only have been brought by the assignee of the bank.

This charge is assigned as a ground of error.

Plaintiff's counsel requested the Court to charge the Jury, that a suspension of payment, and a refusal by the bank to pay specie for their bills, when demanded, was a failure in contemplation of the following section of the charter:

"SEC. XVI. In case of a failure of said bank, all the stockholders who may have sold their stock at any time within six months prior to said failure, shall be liable in the same manner as if they had not sold their stock."

Which charge the Court refused to give, but charged the Jury, that either a general suspension of specie payments, or a failure to pay specie to any and every other person than the plaintiff, was not such a failure as contemplated by said section, and the plaintiff, to avail himself of that clause, must prove a demand for specie and a refusal to pay his claim.

Which charge and refusal to charge, are also assigned as grounds of error.

W. DOUGHERTY, for plaintiff in error, cited and commented on the following authorities:

Bullard vs. Bell, 1 *Mason*, 243. *Angell & Ames*, 556, 8. 8 *Cowen*, 387. *Castleman vs. Holmes*, 4 *J. J. Marsh.* 1. *Bank of Poughkeepsie vs. Ibbotson*, 24 *Wend.* 473. *Spier vs. Grant*, 16 *Mass.* 9. *Hall vs. Carey*, 5 *Kelly*, 239. 8 *Wheat.* 75. *Lumpkin et al. vs. Jones*, 1 *Kelly*, 27. *The Commercial Bank of Natchez vs. The State of Mississippi*, 6 *Smede & Marshall*, 599.

H. HOLT and JAS. JOHNSON, for defendant, cited and commented on the following authorities:

Van vs. Grant, 16 *Mass.* 476. *Ib.* 2. *Berry et al. vs. Mat-*

there et al. 1 *Kelly*, 519. *Angell & Ames*, 750. 2 *Kent*, 305 to 315. 3 *Burr*, 1366. 3 *T. R.*, 199. 3 *Sm. & M.* 791. 8 *Peters*, 251. 10 *Paige's C. R.* 541. 7 *Ga. Rep.* 80. 10 *Metcalf*, 6. 5 *Ga. Rep.* 239. 486. 2 *McMullen*, 429. 6 *Ala. (N. S.)* 289. 1 *Kelly*, 27. *She vs. Bloom*, 19 *Johs.* 477. 8 *Cow.* 391. *Pendergrast vs. Felry*, 8 *Ga. Rep.* 1. *Kenton vs. Greenwood*, *Ibid*, 97.

By the Court.—LUMPKIN, J. delivering the opinion.

This was an action of debt brought by Richard A. Lane, as the holder and owner of the bills of the Planters & Mechanics' Bank of Columbus, to the amount of \$925, against Thomas Morris, as a stockholder in said bank, of one hundred and sixty-nine shares of the capital stock thereof, and seeking to make the defendant liable to the plaintiff (the bank being insolvent,) for such a proportion of his said debt, as the number of shares, so held by the said defendant, bears to the whole capital stock of said bank, which is a million of dollars.

[1.] The first assignment is, that the Court erred in allowing the defendant's counsel to withdraw the demurrer to the plaintiff's declaration, after the judgment of the Court was made thereon.

No authority was produced on the argument, settling what the practice is in this respect. I find, upon examination, that it has not been uniform. There are precedents both ways. Mr. *Sellen*, in his *Treatise on Practice*, page 340, citing *Say*, 312, lays it down, that after argument, and even after the opinion of the Court has been pronounced on the demurrer, it is in its discretion to give leave to withdraw it. In *Ayrs vs. Wilson*, (*Douglas*, 385,) leave was granted to withdraw the demurrer and reply, on payment of costs. There are other cases, however, in the English books, in which it was refused. 1 *East*, 391. 1 *Burr*, 321. 2 *B. & P.* 482. 3 *B. & P.* 11, 12. In the United States Courts, it has been decided that an amendment to a plea may be allowed, after the plea has, on demurrer, been adjudged to be bad. 6 *Cranck*, 206. But whether, upon like principles, the demurrant would have leave to withdraw the demurrer, where a judgment against him has been pronounced, was not decided.

It is immaterial to the present case, whether the practice be established one way or the other. Upon principle, it would seem, that it ought not to be allowed under our system. The demurrer

denies, that by the law arising upon the facts charged in the declaration, any injury is done to the plaintiff, for which he is entitled to recover. The judgment is as peremptory, and should be as conclusive; as if it had been rendered on a verdict found on an issue in fact. To permit the defendant, then, to withdraw the demurrer, after a judgment has been pronounced against him, and interpose the same objection on a motion to arrest the judgment, is giving him an undue advantage, especially as an opportunity may be afforded the Court to correct its error, if any has been committed, on an application for a new trial. Establish this practice, and the Court may, and probably will be called upon to decide the same issue in law three times in the same case.

[2.] The second assignment is, that the Court erred in permitting the defendant's counsel to give parol evidence of the contents of the minutes of the bank-book, without having sufficiently accounted for the loss or destruction of the original book of entries containing those minutes.

The object of the testimony sought to be introduced, was to prove who were the stockholders in the company. I am not prepared to say that it was not competent to make this proof, independent of the book. I am quite clear, however, that the absence of the book was sufficiently accounted for. It is true, that the search for it was not made by the defendant; still the inquiry which was instituted, created a strong probability that the book was lost or destroyed. In addition to this, Morris swore that the book was not in his power, custody or control.

The third assignment is, that the Court erred in overruling the demurrer of the plaintiff to the 5th, 7th, 9th, 10th and 11th pleas, as set out in the record, and in allowing the defence set up therein. It becomes necessary, of course, to examine the several matters put in issue by these pleas. The 5th raises the question, whether or not the Common Law principle—that upon a dissolution of a corporation, all its debts and credits are extinguished—applies to the ultimate right of action, given by the charter to the bill-holder against the stockholder? For greater convenience, and to avoid repetition, I shall reserve this point until I come to consider the charge of the Court.

[3.] The 7th plea alleges, that the plaintiff was not entitled to his action at the time it was brought, because the bank was not at that time insolvent, but had property and assets which had not

been exhausted. In our judgment, this plea is too general—it is too vague and uncertain to take issue upon—it should have specified the property.

The 8th, 10th and 11th pleas all relate to the liability of the stockholders and may be considered and disposed of together.

Q. What stockholders, then, are liable under the charter? I answer, briefly, *all* whom the charter makes so, and none others. The 11th section provides, that “the persons and property of the stockholders shall be pledged and held bound in proportion to the amount of shares, and the value thereof, that each individual or company may hold in said bank, for the ultimate redemption of the bills or notes issued by said bank, *in the same manner as in common actions of debt; and no stockholder shall be relieved from such liability, by sale of his stock, until he shall have caused to have been given sixty days’ notice in some public gazette of this State.*” *Pract. 127.* And by the 16th section, it is enacted, that “in case of a failure of said bank, all the stockholders, who may have sold their stock at any time within six months prior to said failure, shall be liable in the same manner, as if they had not sold their stock.” *Ibid. 128.*

The charter, it will be perceived, does not restrict the liability, as is usually done, to any particular class of stockholders; either those who originally subscribed—those who were stockholders when the bills or notes were issued, or those who were so at the time of the dissolution. It makes provision, however, for all to escape liability who have transferred their stock, and given sixty days’ notice thereof in some public gazette of this State, *provided* the sale has not taken place within six months prior to the failure of the bank, and declares most explicitly, that “no stockholder shall be relieved from his liability,” notwithstanding any disposition he may have made of his stock, until this is done.

All, then, who ever were stockholders, are liable to bill and note-holders, unless they have been discharged in the manner prescribed by the Act. Such is the plain, express and unmistakable language of the Statute; and so ample was the security which the Legislature intended to provide, that even sale and notice is no protection, if within six months of the failure. Each and all are subject to be sued at the instance of any and every bill-holder. There can be but one satisfaction, of course, except for costs; and the stockholder can be charged only to the extent of his stock.

Beyond this, he may defend himself; and on payment to this amount, there is an end of further liability.

I shall not be guilty of the folly of darkening the unambiguous terms of the charter, by "words without counsel." The authority of Sir F. Durriss, could he be invoked to show, that where restrictive expressions are used in a Statute, all things are intended to be excluded, which are not enumerated, on the familiar principle, that *expressio unius est exclusio alterius*; or as it is otherwise worded—*expressum facit cessare tacitum*—that the express mention of one thing, implies the exclusion of another. Reference could be made, too, to reported cases, to establish, that where a general Act of Parliament confers immunities, which expressly exempt certain persons from the effect and operation of its provisions, it excludes all exemptions to which the subject might even before, by law, have been entitled, for the reason that the introduction of the exemption is necessarily exclusive of all other independent extrinsic exceptions. 2 Durr. Stats. 712, 713: *Rex vs. Cunningham*, 5 East, 478. 3 T. R. 442. But it is enough for the Court, in this, as in all other cases, to say that "*thus the law is written.*"

As to the question of contribution between the stockholders themselves, we forbear to discuss it. Not being made by the record, it would be premature to do so.

I come now to the errors alleged to have been committed in the charge of the Court; and—

[5.] 1st. It is insisted, that the Court below erred in holding that the notice, given by the defendant, of the transfer of his stock, was sufficient. The objection to it is, that it did not designate the name of the purchaser. Our reply is, that the charter does not impose this obligation on the seller. The stockholder is required merely to give sixty days' notice of the sale in some public gazette of the State; and this has been done. It is not for this Court to add to or to take from the words of the Act. The object of the notice was, to put the bill-holder upon inquiry. It is his own fault, if he neglects to do so. We are content to incur the reproach implied in the old saw—that he who sticks to the letter of the Statute, looks only *skin-deep* into its meaning. If the *color* clearly indicates the species to which it belongs, we care not to extend our researches any further. We reiterate our abhorrence of judicial legislation. The first, last and only inquiry of Courts

should be—what saith the law? and when the response is received, fearlessly to administer it, leaving it to the Legislature to cure such defects as time may have produced or experience detected.

[6.] 2dly. The Court was asked to charge the Jury, that a suspension of specie payment, and a refusal, by the bank, to pay specie, generally, when demanded, *was a failure*, in contemplation of the 16th section of the charter. The Court refused so to charge, but on the contrary, instructed the Jury, that a general suspension and refusal to pay *others* than the plaintiff, was not such a failure as was contemplated by the Act of incorporation, but that in order to avail himself of the benefit of its provisions, the plaintiff must prove a demand on his own account, and refusal to pay.

It seems to be conceded by counsel, that there was error in refusing to give the charge as asked, as well as in the instructions which were given. At any rate, it was in direct conflict with the judgment of this Court, in *Lumpkin et al. vs. Jones*, (1 Kelly, 27,) as to what constitutes a bank failure, as well as to the general tenor of decisions in this country upon this subject. *State vs. The New Orleans Gas Light & Banking Company*, 2 Robinson's (La.) Rep. 529. *Attorney General vs. The Bank of Michigan, Harrington's Ch. (Mich.) R. 315.*

[7.] 3dly. Counsel for the defendant below and in error argued, that upon the dissolution of this corporation, the debts due to and from it were extinguished; and that nothing could save this case from the operation of this Common Law principle, but the legislation which had intervened, appointing a receiver to collect and pay over the assets; that, consequently, all proceedings must be conducted in his name, and that a party, who claims the benefit of this legislation, must pursue his remedy in accordance with it. The Court sustained this position, and ruled, that the action could not be maintained by the present plaintiff, but that under the Acts of 1842 and 1843, appointing an assignee, suit could be brought by him only, and by no one else.

In the opinion of this Court, the right of the bill-holder, under the 11th section of the charter, to hold the person and property of the stockholder pledged and bound for the ultimate redemption of the bills and notes of the bank, in proportion to the amount of his shares and the value thereof—a right which is not *primary* and *total*, but *secondary* and *proportional*—is one which he may assert in his own name, before or after the *formal dissolution* of

the corporation—one which is wholly above and beyond the reach of any legislation, and independent and irrespective of it. The power and duty of the receiver, appointed by the Legislature, was to take charge of and collect, as early as practicable, the debts and demands due and owing to the bank, and to pay off and discharge its liabilities. See *Pamphlet Acts*, 1842, p. 29, and 1843, ps. 21, 22. But the recovery, in *this action*, constitutes no part of the assets of the bank, but is a supplemental or superadded security, for the benefit of the bill-holder—one which he is authorized to enforce, in his own name, in an action of debt at law, directly against the stockholder.

By the terms of the original grant or contract with the government, the defendant became liable for every bill or note issued by the bank, in two capacities—one as a member of the corporation—the other as an individual stockholder. He may be made chargeable in both of these ways. When pursued as a corporation, it must be at the instance of the directors, or other legally constituted agents of the corporation, or some satisfactory excuse must be rendered for not doing it. But no such case is made by this record. When this defendant made himself a stockholder by subscription or purchase, he became ultimately bound to pay the bills and notes of the bank, by an express stipulation, to which he voluntarily assented for his own benefit, and his individual property and credit were thereby pledged to each holder of the bills and notes, to fulfil this stipulation; and it is upon this undertaking, which no power can impair, that *this proceeding* is instituted. *Penniman vs. Briggs*, 1 *Hopkins' Chan. R.* 300; and in error, 8 *Cowen's R.* 387. *Bank of Poughkeepsie vs. Ibbotson*, 24. *Wend. R.* 473. *Castleman vs. Holmes*, 4 *J. J. Marsh. R.* 1. *Drinkwater vs. Portland Marine Railway*, 6 *Shep. R.* 35. *Slee vs. Bloom*, original case in Chancery, 5 *Johns. Ch. R.* 386. *Proceedings on appeal*, 19 *Johns. R.* 466. *In the Court of Errors*, 20 *Johns. R.* 66. *Spear vs. Grant*, 16 *Mass. R.* 9. *Vose vs. Grant*, 16 *Mass. R.* 476.

I would merely add, that this is one of a new and peculiar class of cases, which owe their origin altogether to recent Statutes, imposing a *personal* responsibility upon the members of a private corporation, in case of the neglect of the corporate body to pay the demands which it has incurred. *Ang. & Am. on Corp.* 556. The constitutionality of these Statutes has been settled, that they

are well calculated to protect individuals, who deal with corporations, from danger of loss, will not be questioned. True, it may be said that these are private transactions, and that it being optional with the people to deal with banks or not—to take their bills or refuse them—the law is not to be *stretched* for their protection. But every body knows that whatever bank notes may be, by the *Constitution*, they are practically and in fact, in a great measure, not only a *legal tender*, but the only circulation in the country. The bulk of the community have no discretion to receive or refuse them. The currency consists mostly of these notes. Every planter, tradesman and small dealer must take them, or be exposed to the greatest inconvenience. Trustees of every description—laborers of every class are exposed to risk; and those, generally, are the greatest sufferers by a bank failure, who are least able to bear the loss. It is the duty, then, of the Legislature to see to it, that this *paper medium* shall be, if possible, truly and substantially what it purports to be—the representative of gold and silver. If it is made penal to pass spurious coin, or to use false or deficient weights and measures, it should be considered equally so to inundate the country with irredeemable bank notes. Sufficient measures have been taken by the government to prevent this, by compelling the *issuers* to become security in person and property for their payment. This is a most commendable policy; and it is not for us to hinder and thwart its salutary operation.

Knowing that this decision would involve principles of the first interest and importance, both to the parties and the public, it is a great relief to feel an unwavering confidence in the correctness of our conclusions; for there is no more unpleasant exercise of our duty, than to be *forced to decide* where we entertain doubts.

[8.] The Statute of Limitations was pleaded to the action, and is insisted on in the brief of the counsel for the defendant. Upon a careful examination of the record, however, we do not see that it is legitimately presented for our determination. I will only repeat now, therefore, what fell from the Court in *delivering* its opinion, namely: that it appears to have been long since settled in the English Courts, that the limitation of six years did not extend to the case of an action of debt, founded upon a statutory liability—the Statute being considered in the nature of a specialty. *Com. Dig. tit. Tempe. G. 15. Jones vs. Pope, 1 Sand. R. 37.*

Doe ex dem. Gledney and another, vs. Deavors.

Hodsdon vs. Harridge, 2. Sand. R. 61, 65. *Talony vs. Jackson*, Gro. Cas, Rep. 513. And that in the case of *Ballard vs. Bell*, (1 *Mason's Rep.* 243,) before the Circuit Court of the United States, in 1817, Judge *Story* reviewed all the authorities upon this subject, and decided that the Statute of Limitations did not extend to an action of debt against the stockholders of a corporation, founded on a statutory liability.

The judgment of the Court below, for the errors specified, must be reversed, and the cause remanded for further proceedings.

No. 79.—*DOE ex dem. SAMUEL GLEDNEY and another, administrators, &c. plaintiffs in error, vs. ISAAC B. DEAVORS, defendant in error.*

[1] Taxes due to the State are a general lien upon all the property of the debtor, attaching on the 1st of January in each year.

[2] Where property, liable to tax, is sold under execution between the 1st January and the giving in or return of the same, and is afterwards sold under execution to pay the tax due by the defendant in execution: *Held*, that the purchaser at the Tax Collector's sale gets a good title.

Ejectment, in Sumter Superior Court. Tried before Judge WARREN, May Term, 1850.

This was an action of ejectment by the administrators of Arnold Godwin, to recover a lot of land in Sumter County. Defendant claimed under a deed from the Sheriff of Sumter County, reciting that the land had been levied on and sold on the 1st Tuesday in April, 1841, as the property of one John Deupree. Plaintiff claimed under a Tax Collector's deed, reciting that the property had been sold on the 1st Tuesday in December, 1841, for the taxes of John Deupree, for the year 1841.

The Court charged, that "the lien or security of the State, for tax due from John Deupree for the year 1841, was destroyed by

like this, where the property has been sold under a general judgment before it is returned, yet after the tax upon it has been imposed by law. The presiding Judge does not seem to hold, that generally taxes are not a lien, but believes that the lien was destroyed by the Sheriff's sale, and that after such sale, the only way in which the State can collect her taxes, is by putting in a claim upon the fund. Inasmuch as the land had been sold, the view of the Judge seems to be, that the State occupied the position of a favored or preferred claimant on it, and failing to assert her claim, lost it, unless the sale by the Sheriff was intended to defeat the payment of the taxes. The question is an important one, and it will be necessary to consider, generally, the question, to what extent assessed taxes are a lien upon the property of the citizen, and if they are a lien particularly, whether in this case it was, as held by the presiding Judge, destroyed by the sale by the Sheriff. The right to tax the whole property of the citizen for the defence of the State and the support of the government, is not a questionable proposition. It is an incident of sovereignty. All property which vests in the citizen by grant from the estate, is liable to taxation, without a reservation of the right to tax. That right grows out of the right of the citizen to governmental protection and the corresponding obligation of the government to protect him. Revenue is indispensable to the maintainance of all the privileges and immunities of the people—it is also indispensable to national independence, without which individual immunities and privileges are valueless. Hence it is, that in the very nature of the social compact, as a basis upon which the foundations of government are laid, the property of the citizen is pledged for these purposes—pledged without any express declaration of a pledge. In the act of organizing a government, the pledge is implied. It is one of the elements of national being. The people who make a government, *ipso facto*, assent to it. This inherent right to lay and collect taxes, may be limited and regulated by the fundamental law, as it is by the constitution of our union. The amount and the mode of assessment, and the manner of collecting it, lies within the legislative competency, to be arranged from time to time, by law, according to the public exigencies. In this country the people impose the taxes which they pay, through their representatives, and the taxing power is not, therefore, likely to be abused. Upon these principles, it has been held, in a sis-

ter State, that the taxes due, in the absence of any legislative declaration upon that subject, are a mortgage to the exclusion of any other lien or incumbrance. The decision goes upon the idea, that the obligation to support the government precedes and is paramount to every contract between citizens; and without amplifying this general doctrine, I leave it with my concurrence. 2 *Bay's Rep.* 244. 4 *Peters' R.* 514. 4 *Wheat.* 428.

However sufficient these principles may be to sustain the tax lien, we are not left to them alone. In our judgement, the laws of the State give to assessed taxes a lien which overrides every other security or incumbrance. By the 14th section of the Act of 1804, which is still of force, it is declared, that "the taxes imposed by this Act shall be preferred to all securities and incumbrances whatever." *Prince*, 847. This section creates a lien. It is argued that it only gives a preference or creates a *grade* of debt, in contemplation of a contest with other securities and incumbrances. Our opinion is, that it creates a general lien, which attaches at the time when the property is liable by law to taxation, upon all the property of the citizen. It is true that the phraseology of the Act might have been more plainly declaratory of a lien. But what is its effect? A legal preference, that is priority, is given to the taxes, not only over all incumbrances whatever—such as mortgages and judgements—but also over all securities—securities by title, as well as other securities. A deed, therefore, upon private sale, will not defeat the preference. It inhibits a sale to the exclusion of the taxes. And it can only defeat the security of a deed, upon the idea of a lien on the property. If a title by deed, upon private sale, will not defeat the tax lien, a title by deed upon a judicial sale will not, *a fortiori*; for, the lien of the judgement, under which the purchaser at the judicial sale gets his title, is unquestionably postponed by the Act. There is no particular form of words necessary to create a lien. The plain import of this Act is a legal preference for satisfaction *out of the property* of the person taxed, over every security and every incumbrance, and that is a lien. The Legislature, no doubt, intended simply to declare the great fundamental principle, that the *property* of the citizen is pledged to the exclusion of all private contracts—to the support of the government. That principle elucidates the enactment. If the lien exists without a legislative declaration—if it be an elementary principle of government, re-

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recognized by the ablest statesmen, it can hardly be presumed that the legislature intended to innovate upon and weaken it. If the Act only creates a preference over other claims, it is available for the protection of the State, only when a citizen is dead and his estate is for distribution, or when he is insolvent, or when there is a fund in hand for distribution. Upon this idea, it looks to marshaling assets. And in case of the alienation, *bona fide*, of property by private sale, this construction would wholly defeat the security of the State. In this very case, as I shall show, it would defeat the collection of taxes altogether. I do not mean to say, that when the money of the citizen is in the hands of the Court, and the tax is in a situation to be presented as a claim upon it, that that claim would not be good. If the Act creates a lien on property, the lien equally attaches upon its proceeds. But in such a case, I do not believe that the lien of the State would be lost by its agent failing to put in a claim upon the fund, upon the principle that no *laches* can be imputed to the State. It is not enough to say, that the collector and his security would be in that case liable, for that liability is only a cumulative security for the State. The lien is a general one. The whole property is bound for the taxes. That it is not confined to the specific property upon which each item of the tax arises, is manifest in this. The law requires the personal estate first to be sold to pay the tax, and if none, or not enough, then the real estate. Accordingly, taxes originating on lands may be paid out of the personal estate, and *vice versa*. It takes effect when, by law, in each and every year the property is made taxable—that is to say, on the first of January. It is the imposition of the tax by law which appropriates, if needs be, the property of the citizen to the public use. The lien, therefore, does not commence only with the return of the property, or with the return of the digest by the Receiver to the Collector, or with the issuing of execution to enforce payment. *Dudley*, 15. 8 *Watts & Searg. R.* 449.

It is argued that the taxes are not a lien, from certain provisions of the tax-law—such as that which declares all sales, made to prevent their payment, void—that which makes them first to be paid, in case of the death of the debtor, and charges the administrator, personally—and that which charges the mortgages with the tax due upon the mortgaged property. These provisions of law do not set aside the lien created by the 14th section.

nor are they incompatible with it. Some of them, it may be, are unnecessary—as for example, that which declares void all gifts and conveyances, &c. made to avoid the payment of taxes. If there is a lien, this provision is useless. All these things, and others—for example, the summary process with which the Collector is armed to collect, and the prohibition of all judicial interference between the State and the debtor, look to the same end, and that is the *prompt and necessary* payment of the taxes. The State must have her revenue, at all hazards. Hence these various stringent provisions of law to constrain payment. Prompt collection is as necessary as the lien. But if, in all cases of sale of the property, as here, the State is to rely upon the fund, she may be delayed by litigation, and is really made dependent upon judicial interference. She must put in her notice, or file her injunction—await the regular time for a hearing—abide delays, continuances and collateral issues. In short, she is no better off than any other judgment creditor. No. To collect taxes, the State moves with uncontrollable power directly and instantaneously upon the property; and if, in the exercise of this stern but necessary attribute of sovereignty, the citizen is injured, his only redress is by petition to the Legislature.

[2.] In the case made in this record, if the doctrine of the Court prevails, and in all like cases, the tax will be lost to the State. Here the Sheriff sold in April. The land sold was taxable on the first of January preceding. At the time of sale, the land had not been returned to the Receiver—the Collector knew not that it was taxable as the property of the defendant—he had no power over it—he could put in no notice to retain—he could institute no process to hold up the fund. The Sheriff, officially, could know nothing of the claim of the State for taxes. He was not restrained from paying over at once the proceeds of the sale to the judgment in his hands; and if paid, then all means of security to the State is lost forever. The Collector and his sureties would not be liable, for he could not be in default. So it would be in any case where there is a *bona fide* sale of property intervening the first of January and the return of the digest of taxes to the Collector, whether that sale be private or judicial. The consequence of this doctrine would clearly be a loss to the State of no inconsiderable amount of her revenue, and a serious injustice to the tax paying portion of the people.

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In the case before me, the Collector has pursued the course which the law points out. When the tax was collectable, and default in payment made, he issued his execution—the land is levied on and sold. The question put by one of the counsel for plaintiff in error, (Col. Brown,) is conclusive of the case. If these proceedings are authorized by law, (and that they are, no one questions) *does not the purchaser get a title?* If he does not, then the State has devised an ingenious piece of statutory mechanism, for the purpose of entrapping her citizens. The previous purchaser has no right to complain, for the tax lien is by public law, and he is presumed to buy with notice.

In the argument of this cause, the defendant in error relied upon the decision of the Supreme Court of the United States in *Conrad vs. The Atlantic Insurance Company of New York*, 1 Peters 386. That decision places a construction on the 65th section of the Act of Congress, passed in 1799, which is as follows: "In all cases of insolvency, or when any estate in the hands of executors, administrators and assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States shall be first satisfied; and any executor, administrator, or assignee, or other person, who shall pay any debt due by the person or estate, for whom or for which they are acting, previous to the debt or debts due to the United States from such person or estate, being first duly satisfied and paid, shall be answerable in their own person and estate, &c." The Supreme Court held, that the priority, thus limited in behalf of the United States, was not a right that superseded and overruled an assignment made by the debtor, and subjected the property so assigned to execution; but was a right of prior payment out of the general funds of the debtor, in the hands of the assignee. This decision is inapplicable to the present case. A similar provision of law is made in this State when a debtor for taxes dies between the time of giving in his taxes and the payment. A *priority* is created in behalf of the State for the tax, and the administrator is bound to respect that priority, at the peril of personal liability. *Prince*, 847. If this were the only provision of our law on the subject, the question would be very different. We should construe it as the Supreme Court did, a like law of Congress, as giving a right only of prior payment. But it is not. In the same section, the Legislature declares that the taxes shall be preferred to all securities and

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incumbrances whatever. As before stated, the priority given in case of death, is cumulative, and intended to secure prompt payment of taxes. The law of Congress does not pretend to give to the United States a lien—it only pretends to create a preference in the cases stated, of insolvency, &c. It cannot be enlarged beyond its terms. Our law, in general terms, conveys a preference over all incumbrances and securities, and, as we think, creates a lien.

Let the judgment be reversed.

No. 80.—DANIEL HIGHTOWER, plaintiff in error, vs. DOZIE THORNTON and others, defendants.

- [1.] At Common Law, upon the dissolution of a corporation, the debts due to and from it are extinguished.
- [2.] The individuals who compose a corporation, (and a corporation aggregate is nothing more than an association of individuals,) may, by contract or in law, incur liabilities, during its existence, which will survive the charter.
- [3.] Unpaid subscriptions to the capital stock of a company, are corporate property, which can be reached by the creditors in a Court of Equity, and this right exists entirely independent of any statutory provision.
- [4.] A Court of Equity will provide a remedy to enable the creditors to appropriate this trust fund.
- [5.] The doctrine of Dr. Salmon's case, (1 Cases in Ch. 204,) questioned.
- [6.] Legislative Acts, as well as the decrees of Courts of late years, evince a sounder and purer morality, with regard to the liability of moneyed corporations.
- [7.] It is the amount of shares subscribed, and not the sums actually paid in, which constitutes the capital stock of a company.
- [8.] The subscription for stock, is a debt which the corporation may call in to satisfy the creditors.
- [9.] The equity of the creditor is equally strong where the stockholder has contracted to pay—but failed to do so—his portion of the capital stock, as where it has been paid in and afterwards withdrawn.

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- [10.] The right to have the *unpaid stock* called in to extinguish outstanding debts, is as clear and strong *after* as *before* the dissolution of the corporation.
- [11.] It has been held in South Carolina, that the stockholders can be made liable to the creditors beyond the amount of their capital stock, unless their liability is restricted by the charter.
- [12.] A distinction attempted to be taken between the liability of moneyed corporations and rail-road and manufacturing companies, none in reality exists; if any difference, *against the former*.
- [13.] A periodical madness seems to pervade every section of the country in the business of banking, leading, necessarily, to *over issues* and consequent *depreciation*. It is the duty of the government to guard against this mischief; and the regulations provided by law for this purpose, instead of being relaxed, should be rigidly enforced by the Courts.
- [14.] The provision in this and other charters, for the forfeiture of stock, is for the *benefit* of the *corporation* to coerce punctuality in the payment of instalments, and in case of failure, to afford to the company a speedy method of converting the stock into cash; and was not intended as a *privilege* to the *stockholder* to abandon his subscription.
- [15.] The power to sell the stock of a delinquent stockholder is a *cumulative* remedy, and does not impair the right to compel payment by action.
- [16.] This being a case of direct and purely technical trust, not cognizable at law, but falling within the proper, peculiar and exclusive jurisdiction of a Court of Equity, is not subject to the Statute of Limitations.
- [17.] On a motion to dismiss a bill for *want of equity*, the question as to *parties* does not legitimately arise.
- [18.] Lord *Hardwick* is reported to have said, that a bill will never be dismissed for want of parties; and this is true, provided the necessary parties can be made; and leave will be granted to make new parties, either by an amendment or a supplemental bill.
- [19.] If it is apparent that parties cannot be made, and there can be no decree without them, the bill will be dismissed.
- [20.] The Legislature having recognized and ratified the appointment of a receiver or assignee, made by the stockholders before the forfeiture of their charter, the duty of calling in the *unpaid stock* to discharge debts, devolves properly upon the trustee.
- [21.] If the trustee fraudulently combining with the stockholders, neglects or refuses to do his duty, the proceeding may be maintained directly by the creditor in his own name against the stockholders, making the receiver a party defendant to the case.

In Equity, in Muscogee Superior Court. Decision by Judge ALEXANDER, May Term, 1850.

The bill in this case was filed by Daniel Hightower, alleging that he was a judgment creditor of the Planters & Mechanics'

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Eq. §1252. *Wood vs. Dummer*, 3 *Mason*, 308. *Nevitt vs. Bank of Port Gibson*, 6 *Smede & Marshall*, 557. *Mumma vs. Potomac Company*, 8 *Peters*, 281. *Vose vs. Grant*, 15 *Mass.* 505, 517 and 522. *Spear vs. Grant*, 16 *Mass.* 9 and 15. *Bleakney vs. Farm. & Mechanics' Bank of Greencastle*, 17 *Serg. & Rawle*, 65. *Lindell vs. Benton & Kenedy*, 6 *Miss.* 364. That when the rights of a party plaintiff depend upon the facts, that an assignment was made by a bank, he must prove them, notwithstanding they are recited in a public Act of the Legislature. *Dougherty vs. Bethune*, 7 *Ga. Rep.* 90.

H. HOLT and SURGES, for defendant in error, insisted—

1st. That the complainant shows by his own bill, that at the time he dealt with said bank and became one of its *depositors*, its charter had been violated, and proceedings had been sued out and were pending for the forfeiture thereof. Of this, he had notice both by *lis pendens* and public law.

The principle is without controversy, that if one deal with an agent, himself having knowledge of his want of authority, or that he is misadministering the affairs of his principal or transcending the limits of his authority, the principal is not thereby bound. *Paley on Agency*, 200. *Story on Agency*, page 546, 622, §§442, 482. 1 *Esp. Reps.* 290. *Cowen and others vs. Simpson*, 14 *Mass. R.* 58, *Wyman vs. Hallowell and Augusta Bank*. 2 *Mason's R.* 3. *Bellogs vs. the same*. 4 *Smede & Marsh.* 312, *Lake et al. vs. Mumford*. 1 *Speer's R.* 433, *State vs. Bank of South Carolina*. 17 *Mass.* 28, *Salem Bank vs. Gloucester Bank*. 1 *Kelly*, 27. 13 *Ohio*, 12, 269. 1 *Sup. to U. S. D.* 436. 7 *Ga. S. C.* 80. 10 *Metcalf*, 325, 369. 2 *Sup. to U. S. D.* 91.

2d. Said bill is defective, for the want of proper parties.

1. It is a creditor's bill, and by an individual creditor, showing upon its face that there are other creditors, without showing who they are or the amount of their claims.

2. It shows that there are other parties (stockholders,) alike liable with the defendants sued, and alleges no sufficient reasons and excuses why they are not made parties.

3. If the complainant can be excused from making other parties complainants and defendants, then we insist that the names of the omitted parties, the amount of their claims and the extent of

their liability, &c. should have been set forth. 2 *Story's Eq.* §1526. 2 *Mason's Reps.* 190, 6, *West vs. Randall et al.* 4 *Ga. Sup. Ct.* 586, *Rice vs. Tarver et al.* 5 *Ga. Sup. Ct.* 28, *Wells et al. vs. Strange.* 6 *Ga. Sup. Ct.* 468, *Smith & Shorter vs. Mitchell.* 7 *Ga. Sup. Ct.* 98, *Carter et al. vs. McDougald et al.*

3d. The demand of the complainant had its origin in a certificate of deposition, and now exists in a judgment rendered thereon. The stockholders (as such) are not and never were liable for either of such demands. *Prince's Dig.* 127, '8. 1 *Kelly*, 435, *Collins vs. Central Bank et al.* 1 *Kelly*, 461, *Bullard vs. Central Bank.* *Angel & Ames on Cor.* 546. 14 *Mass.* 58, *supra.* 4 *Sm. & Marsh*, 312, *supra.*

4th. Admitting the existence and legal effect of the Act of incorporation at the filing of the complainant's bill, then we insist—

1st. That none but the board of directors had authority to call for instalments upon stock.

2d. That they could only make such calls in terms of and in the manner pointed out in the Act of incorporation.

3d. If the complainant, or any other than the board of directors, could make such calls, it could only be done in the manner and according to the form provided and fixed in the charter. *Prince's Dig.* 125. 8 *Cowen*, 387, *Briggs vs. Pennyman, Spencer, J.* 5 *Mass.* 491, *Gilmore vs. Pope.* See also, 10 *Mass.* 334. 14 *J. R.* 238, *Dutchess Cot. Man. vs. Davis.* 3 *Ala. Rep.* 666. 5 *Ala. Rep.* 403. 11 *Ala. Rep.* 472.

5th. A judgment of forfeiture, without condition or saving, is alleged to have been rendered. Then, no demand remains to the complainant, and no liability rests upon the defendants. *Angel & Ames on Cor.* 750. 2 *Kent's Com.* 305 to 315. 3 *Burrows' R.* 1866, *Colchular Cor. vs. Seaber.* 3 *T. R.* 199, *The King vs. Passmore.* 3 *Smede & Marsh.* 791, *Bank of Miss. vs. Wren.* 8 *Pet. Rep.* 281, *Mumma vs. The Potomac Co.* 10 *Paige's Ch. R.* 541, *W. & J. James vs. Woodruff et al.* *Angel & Ames on Cor.* 482, §8; 493, §14. 7 *Ga. S. C.* 80. 13 *Ohio.* 10 *Met.* 6 *S. & M. sup.*

6th. The fifth proposition assumes, as the bill alleges, that the judgment of forfeiture is absolute and without condition or saving, and it is in fact so rendered. It may, however, enter into the consideration of this Court to enquire how far the consequences of the forfeiture are saved by the Acts of the Legislature, pro-

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viding for its rendition and fixing the rights, liabilities and remedies of debtors, creditors and stockholders. We insist—

1st. That by their provisions and savings, no right remains or is saved to the complainant to sue.

2d. That no duty or obligation rests on the defendants in this or any proceeding, either in a Court of Law or Chancery, to answer his demand. *Prince's Dig.* 125, '6, '7. *Pamphlet Acts*, 1840—27, 1841—29, 1842—29, 1843—21. 5 *Ga. Sup. Ct. Reps.* 239, *Hall et al. vs. Cary, assignee.* 2 *McMullen*, 439, *State vs. Bank of Charleston.* 6 *Ala. Reps.* 289, *Crawford vs. Planters & Mech. Bank.* 8 *Peters*, 281, *supra.* 1 *Kelly*, 27. 7 *Ga. S. C.* 80, *supra.*

7th. We insist upon the Statute of Limitations, as a bar to the complainant's rights, if any otherwise would remain to him. Is it replied that it is a trust fund in the hands of the defendants, which the complainant is seeking to pursue? When did the relation of trustee and *cestui que trust* happen, and when did it cease to exist? When did their interest become adverse? *Angel & Ames on Cor.* 556. 19 *J. R.* 477, *Slee vs. Bloom.* 8 *Cowen*, 391, *Briggs vs. Perryman.* 2 *Story's Eq.* §1521 a, page 989. 5 *Ga. Sup. Ct.* 486, *Dickman vs. McCamy.* 8 *Ga. Sup. Ct.* 1, *Pendergrast et al. vs. Foley, adm'r.* *Ibid.* 97, *Keaton vs. Greenwood.* 2 *McMullen*, 439, *supra.* 1 *Speers*, 433, *supra.* 1 *Kelly*, 27. 7 *Ga. S. C.* 80, *supra.*

8th. If the defendants are liable, it is upon a promise or contract to pay, express or implied. To pay whom and when? As between them and the complainant, no promise or consideration has passed. 5 *Mass. R.* 491, *Gulmore vs. Pope.* 10 *Ibid.* 334, *supra.* 14 *J. R.* 238, *supra.*

9th. The complainant is seeking the recovery of a demand against an insolvent corporation, and taking his own allegations most strongly against himself, it was so when he acquired his demand. He should, therefore, have shown by his bill, to entitle him to any relief, when, how and at what cost he acquired his demand, as he is only entitled to recover so much as, and no more than it cost him. 1 *Kelly*, 435, 461. 6 *Paige's Ch. R.* 486.

By the Court.—LUMPKIN, J. delivering the opinion.

The case made by this record is simply this: A judgment creditor of the late Planters & Mechanics' Bank of Columbus, having

prosecuted his claim against the corporation to *insolvency*, filed his bill, alleging that the corporation was dissolved, both in *fact* and in *form*, and praying that the stockholders of the bank, who, it was averred, had paid only twenty-five dollars on the share—the capital stock being one million, in shares of one hundred dollars each—might be decreed to pay into Court such sums on their *unpaid stock* as should be sufficient to discharge the complainant's demand.

Are these unpaid subscriptions corporate property, and can they be reached by the creditors in a Court of Equity?

[1.] Upon the threshold of this discussion, we are met with the Common Law principle—that upon the dissolution of a corporation, the debts due to and from it are extinguished. A doctrine which results, necessarily, from the fact, that the corporation having expired, whether by its own limitation, by surrender, abandonment of its members or judgment of dissolution, there is no one in law to sue or be sued.

[2.] But it does not follow, that the individuals who composed this corporation, (and corporations, aggregate, are but associations of individuals,) may not, by *contract* or in *law*, have incurred liabilities which will survive their charter, and which will be enforced at Law or in Equity, according to the circumstances of the case. In the case of *Lane and Morris*, just decided, the liability was *by contract*, and a common action of debt, as provided for by the charter, was found to be an ample remedy.

[3.] Here the liability is *equitable* only, resulting from the undertaking of the defendant to the corporation—that he would subscribe so much to the capital stock of the company. After having acquired credit and contracted debts, upon the faith of this subscription, the company has failed, and its franchise been seized into the hands of the State, upon *quo warranto*. Will not the party be bound in Equity to fulfil his promise?

[4.] And will not a Court of Equity provide a remedy to compel him to perform his just obligations, notwithstanding the dissolution of the corporation?

When, upon *quo warranto*, the franchise of the City of London was recalled by the King, their right to sue as a corporation ceased; but their liabilities, in the capacity they had sustained, were not extinguished. —8 *St. Trials*, 1087.

Judge Story, in treating of *implied trusts*, says, that to this head

may be referred that class of cases, where *the stock*, and other property of private corporations, is deemed a *trust fund*, for the payment of the debts of the corporation. So, that the *creditors* have a lien or right of priority of payment on it, in preference to any of the stockholders in the corporation. Therefore, if the corporation is dissolved, the contracts of such corporation are not thereby deemed extinguished; *but they survive the dissolution of the corporation*, and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of a *bona fide* purchaser; for such property will be held affected with a trust, *primarily* for the creditors of the company, and subject to their right, *secondarily* for the stockholders, in proportion to their interest therein. *Upon the like ground, the capital stock of an incorporated bank is deemed a trust fund for all the debts of the corporation.* 2 Stor. Eq. Jur. §1252.

We have, then, the authority of this great Judge, for holding that the *capital stock* of *this bank* is deemed a *trust fund*, for the payment of complainant's demand. What constitutes the *capital stock* of this corporation, we shall see hereafter.

[5.] I shall pass over the English adjudications upon this subject, and especially the leading case of *Dr. Salmon vs. The Hamborough Company*, (1 Cases in Chancery, 204,) not because I do not believe that the doctrines which it contains are in perfect accordance with the well established principles of law and equity, but because doubt has been expressed as to the authority of this case. 1 Fonb. Eq. 297, note. And I desire that the equity jurisdiction, which is here sought to be maintained, may rest upon a foundation that cannot be shaken. Sufficient to say, then, that in the *professional* opinion of Chancellor Kent, read on the argument of *Nevitt vs. Bank of Port Gibson*, (6 Smede & Marsh. 513,) he asserts that there is not an instance in the *English* law, in which the funds of an insolvent or forfeited moneyed institution, have been permitted to be abandoned, and creditors denied redress and payment out of them; and he adds—that to permit the odious and obsolete doctrine of ancient date, before moneyed institutions were introduced, to be now applied to the dissolution of a bank, perhaps by its own mismanagement and abuse, so that all its assets were to be considered as dispersed to the wind, without any owner or power any where to collect and justly apply them, *would be a disgrace to any civilized State.*

[6.] But this, he says, cannot take place, inasmuch as the improved and enlightened administration of equity jurisprudence, in every part of the country, has taught and established sounder and juster doctrines; and that this is apparent in the legislative Acts and in the decrees of Courts of Equity, relative to insolvent and dissolved moneyed charters.

I might have forbore to introduce this opinion, had it not been that the views which it inculcates were fully sustained and sanctioned by the "upright, firm and enlightened" tribunal to which it was addressed.

In *Vose vs. Grant*, (15 Mass. R. 505,) Judge Jackson expressed the opinion, that the creditors of a joint stock company would have an adequate remedy in a Court of Equity, against the individuals who had composed it.

[7.] In *Spear vs. Grant*, (16 Mass. R. 9,) the Court admitted that the stock actually vested, should be considered as pledged for the payment of the debts of the corporation, as far as it would go, and that if it was withdrawn before the debts were discharged, that there would be an equitable obligation on the part of the stockholders, to account for so much as they originally consented to subscribe. But Mr. Chief Justice Parker, who gave the opinion of the Court, was unable to discover any adequate mode at Common Law, by which a creditor could compel any stockholder to pay him the amount of his stock; and that the remedy, if any there was, would be before a tribunal which was empowered to act upon the whole subject matter in an equitable point of view.

In the case of *Wood vs. Dummer*, (3 Mason's Rep. 308,) the plaintiff, as holder of the notes of the Hallowell and Augusta Bank, brought a bill in Equity, in the Circuit Court of the United States, before Mr. Justice Story, against the stockholders of the bank. The learned Judge sustained the bill, and founded the decree of the Court upon the liabilities assumed by the several stockholders, in their subscription to the capital stock. The bill alleged the insolvency of the bank and the withdrawal of its funds by the stockholders. The Court, however, proceeded upon the principle, that the capital stock was a trust fund, and that the stockholders, both in law and in fact, were affected with notice of the trust, and the foundation of the decree, was the agreement of the stockholders to pay the sums they had respectively subscribed to the capital stock. This agreement was with the corporation, which

was liable in the *first instance*, and the creditors had a right to claim, that as against the individual members, *their equities should be worked out through the corporation.*

In *Briggs vs. Penniman*, (8 Cowen, 387,) it was held by the Court of Errors of the State New York, *that the stock subscribed and agreed to be paid into the company, became corporate property, and when paid in, might be reached by ordinary proceedings; and if not paid in, a Court of Equity would compel the trustees to collect and apply it to the payment of debts.*

The same principle was acted upon in *Slee vs. Bloom*, (19 Wheat. Rep. 456,) in which the stockholders were required, in the first instance, to pay up the amount of their subscriptions, for the benefit of the creditors—that this, being corporate property, is a fund, say the Court, for the benefit of creditors, *existing entirely independent of any statutory provision.*

[8.] An Act of the State of Connecticut, incorporating a manufacturing company, provided that the capital stock of the corporation should not exceed \$50,000—that a share of the stock should be \$100—that the directors might call in the subscriptions to the capital stock by instalment, in such proportions and at such times and places as they should think proper—that within three months, not less than \$5,000 of the capital stock should be actually paid. There is a most striking resemblance between the provisions of this charter and that under consideration, as well as the facts of the two cases.

After the stockholders had paid in 40 *per cent.* on their subscriptions, the corporation became insolvent, having no visible property; and on a bill in Chancery, brought by certain creditors, praying that they might be compelled to pay in the remaining 60 *per cent.* (or so much thereof as should be necessary,) to be applied to the payment of the debts, it was held—

1. That the obligations which the stockholders assumed, *by their subscription to the capital stock of the corporation*, was to pay the sum of one hundred dollars on each share, in such instalments and at such times as should be required by the stockholders.

2. That *the amount of the shares subscribed, and not the sum actually paid in, constituted the capital stock of the corporation.*

3. That when further instalments became necessary to meet the debts of the corporation, it was the duty of the directors to

In New York, on the formation of the Mohawk Insurance Company, the directors resolved to reserve a majority of the stock for themselves. Each director subscribed for 1042 shares; and gave a promissory note for the amount. The defendant, *Whitlock*, was one of these directors, giving his note in \$20,840 for 1042 shares. The company became embarrassed, and Whitlock induced the President, John D. Brown, in consideration of \$6,000, to stand in his place for the shares. This was done without any sanction of the company. Brown gave up (from the company's effects,) to Whitlock, his note for the \$20,840, and substituted his own, and had the 1042 shares of stock placed in his (Brown's) name. Brown was at this time insolvent. This was held to be a fraud upon the creditors of the company, and that Whitlock should make good the amount of his note for \$20,840. Vice Chancellor *McCoun* said, *that he could not bring his mind to any other conclusion than that the defendant was liable and bound to make good the stock which he subscribed for in the company on its organization, and for which he gave his note in the sum of twenty thousand, eight hundred and forty dollars.* 3 *Edw. Ch. Rep.* 215. And this decree was affirmed by the Chancellor. 9 *Paige*, 152.

In *Allen et al. vs. Montgomery Rail Road Co. et al.* (11 *Ala. Rep. N. S.* 437,) the Court ask, "has, then, a Court of Equity the authority to reach subscriptions for stocks to satisfy a creditor, when there is a deficiency of legal assets, in the absence of any call by the corporation upon its stockholders? That it has, is, we think, a clear position, as well on principle as authority. As the individual corporators are not, themselves, personally responsible for the contracts of the corporation, there is no responsibility any where, if the *capital stock* is not a fund answerable to the creditors; and it would seem to make no difference in the right, whether this capital stock or fund existed in property or equitable assets; nor can it vary the right, if the Legislature, instead of requiring the stock to be paid in, has permitted the corporation to call for it, as their necessities or the convenience of the stockholders may require. In the latter case, the subscription is a debt which the corporation may call for; and if the debts contracted are beyond the assets in hand, it would be most inequitable to neglect or refuse to make the call, so as to discharge the debt. It is on this obvious principle, that a Court of Equity assumes jurisdiction, and compels the corporation and stockholder to do that which

that a Court of Equity will devise a mode, for the purposes of the remedy, to hold the true parties to their just obligations.

[11.] The case of *Hume vs. The Winyaw and Wando Canal Company*, (*Carolina Law Journal*, vol 1, p. 217,) carries this doctrine much farther: Chancellor *Desaussure* was of the opinion that the individual corporators would be liable in Equity for debts contracted with their consent, *beyond the amount* of their *capital stock*, on the same principle that they are bound for their subscriptions to the capital, unless their liability is limited by the terms of the charter, as it may be, by express provision to that effect. And there are not wanting jurists of great respectability, who think that "no principle can be more equitable than this, and none more just." We decline, however, endorsing the doctrine to this extent, not caring to go beyond the case made by the record; to provoke a controversy with those who "fear there is a tendency in the judicial mind of the age, to seek first for the equity of the case, as it is termed, and then for the law to support it," which *complaint*, by the way, I take to be a merited compliment to the purer and more elevated morality which adorns the pages of modern jurisprudence. I am content, however, to abide by the equity "of the *Hardwicks*, the *Thurlows* and the *Eldons* of England—of the *Marshalls*, the *Washingtons* and the *Kents*" (and *Storrs*) "of the United States—an equity without discretion, fixed as the principles of the Common Law, and like it, worthy of the freemen of whose fortunes it disposes."

It has been contended by one of the learned counsel for the defendant in error, that the amount *paid* is on the shares, and not the sum specified in the charter, constituted the *capital stock* of this bank. It will be perceived, however, that the Act itself has settled this question, designating as it does in so many words, the million of dollars authorized to be subscribed for, its *capital stock*.

Vice Chancellor *Sandford*, in *Barry vs. The Merchants' Exchange Company*, (1 *Sandf. Ch. R.*: 280,) has given a definition of what is meant by the capital stock of a corporation. "It is," says he; "the aggregate amount of the funds of the corporation, which are combined together under a charter, for the attainment of some common object of public convenience or private utility. *The amount is usually fixed in the Act of incorporation*, although it is sometimes otherwise. It is thus limited in reference to the convenience of the intended corporators, and for the information

is to say, that if upon \$250,000 paid in, the bank is authorized to contract liabilities to the amount of \$750,000, if in any case Equity would decree that so much of the unpaid stock should be contributed, as was necessary to extinguish the liabilities of the corporation, it would be this. And does experience prove that *banks* are less likely to contract debts beyond their means, than other corporations?

[13.] On the contrary, their history demonstrates, that there is no business so liable to be *overdone*, because none which holds out more tempting prospects to grow suddenly rich—none has been managed in a more reckless and improvident manner. A periodical madness seems to pervade the Union upon this subject, from which none are exempt. “The cool and sagacious sons of New England—the impetuous and impulsive children of the South and the hardy and adventurous men of the West, have all performed the same circuit.” Prudent and conscientious bankers (and there are many such among us) need not and will not complain of the checks thus thrown around their business. But be that as it may, any system of laws is essentially vicious, which allows *natural or artificial* persons to prey upon a credulous public, without let or hindrance. It is admitted that the country has sustained infinitely more injury from the circulation of worthless paper, than from the issue of spurious coin; and the financial abilities of the ablest statesmen have been tasked to the utmost to prevent a recurrence of the disasters produced from this cause in past years. At last the Legislatures of the several States, determining to protect those who were incapable of protecting themselves, have caused provisions to be inserted in modern charters, making each member, to a certain extent at least, *personally* liable, in his private estate, for the company debts; and the Courts, in some respects, have applied the principle of copartnership to private corporations. Due regard for the interest of the community, in my humble judgment, requires that those regulations and decisions, instead of being relaxed by the Courts, should be rigidly enforced. They would be recreant to their duty, in any wise to impair the security thus afforded, and perhaps the very best that could be devised against *over issues* or *depreciation*.

[14.] The third section of the charter declares, that “if there shall be a failure in the payment of any sum subscribed for by any person, copartnership or body politic, when the same is re-

quired to be paid by this Act, the share or shares upon which such failure shall happen or accrue, shall be, for such failure, forfeited, and may be again sold and disposed of in such manner as the directors shall order and provide, and the proceeds from such sale, together with the sum or sums which may have been paid thereon, shall revert to the benefit of said corporation." *Prince*, 125.

Now, it is argued, that a Court of Equity cannot coerce the contribution of the unpaid stock, because the stockholder has the right, under this clause in the charter, to abandon his shares altogether, even without the consent of the corporation, during its existence. We apprehend the law to be otherwise. This provision in the charter was inserted for the benefit of the corporation, and not of the stockholder. It was thought that this provision would coerce punctuality in paying the calls upon the stockholders, and if not, that it would secure to the company the speedy receipt of the money, by the sale of the stock.

[15.] And where the Statute, as here, gives to a corporation the power to sell the shares of a delinquent stockholder, the remedy is *cumulative*, and does not impair the right to compel payment by action. *Instone vs. Bridge Co.* 2 *Bibb*, 577. *Tar River Navigation Co. vs. Neal*, 3 *Hawks*, 520. *Highland Turn. Co. vs. McKean*, 11 *Johns. R.* 89. *Hartford & R. Co. vs. Small*, 12 *Conn. R.* 499. *Dutchess Cotton Man. Co. vs. Davis*, 14 *Ib.* 233. *Herkimer Man. & Hyd. Co. vs. Small*, 21 *Wend.* 273. *Troy Turn. & R. R. Co. vs. McChesney*, *Ib.* 296. *Bean vs. Cahawba, &c. R. R. Co.* 3 *Ala.* 660. *Selma and Tenn. R. R. Co. vs. Tipton*, 5 *Ib.* 787. *Gratz vs. Redd*, 4 *Mar.* 103. 1 *Binny*, 70. 4 *Ala.* 7. *Goshen Turn. Co. vs. Hustin*, 9 *Johns. Rep.* 217.

I would add, merely, that the decree to be rendered, can and should be so moulded as to give to the stockholders all the privileges to which they would have been entitled under the charter, had the stock been called in by the directors during the existence of the corporation.

[16.] As to the Statute of Limitations, it need only be said, that this is a case of a *direct* trust, purely technical, not cognizable at law, but falling within the proper, peculiar and exclusive jurisdiction of a Court of Equity; and, consequently, one not subject to the presumption of satisfaction or payment or waiver. 2 *Myline & Keene*, 225. 4 *Myline & Craig*, 62. 5 *Ves.* 485. *Str*

H. v. v. Thornton and others.

G. Cooper, 201. 1 *Cox*, 28, 31. 1 *Jacob & Walker*, 51. 17 *Ves.* 87. Not only is this claim *not subject* to the Statute of Limitations, but the doctrine of *stale demand* does not apply to it; for the bill was filed in five years after the liability accrued. The right to go into Equity accrued from the time when the legal assets of the corporation were exhausted; in other words, when the complainant could no longer make his remedy against the company available *at law*. The return of *nulla bona* on the execution is dated in April, 1843, and the bill was filed in April, 1848, just five years thereafter.

Our judgment then is, that there was equity in the complainant's bill; that notwithstanding the dissolution of the corporation, by a forfeiture of its franchises, the obligation of its contracts survived, and that the creditors have a right to enforce their claims against any property belonging to the corporation, which has not passed into the hands of *bona fide* purchasers, and that so much of the capital stock *originally subscribed* for, as remains *unpaid*, is a *trust fund* for the payment of debts, subject to be reached in a Court of Equity, and made available for this purpose.

[17.] Finally, it is said that this bill was rightfully dismissed, because the proper parties were not before the Court; that it was a creditor's bill, showing upon its face that there were other creditors, without stating who they were, or the amount of their claims; that it was apparent, also, that there were other stockholders alike liable with the defendant, and no sufficient reason or excuse is alleged for not proceeding against them also; and at any rate it is insisted, that if the names of the parties are omitted, that the amount of their claims and the extent of their liabilities should have been set forth, and that for lack of this information, no decree can be rendered—no relief afforded.

But that above all, if this Court should be of the opinion that the Common Law consequences of the forfeiture of a charter are saved in this case by the Acts of the Legislature of 1840, 1841, 1842 and 1843, providing for the rendition of the judgment of forfeiture, and fixing the rights, liabilities and remedies of debtors, creditors and stockholders, then it is most strenuously urged, that by the provisions of these Statutes, there is no right reserved to this complainant to sue, and no duty or obligation resting on the defendant in this or any other proceeding, either

during the continuance of the charter, respecting the 5 per cent. instalment; or that he has failed or refused to take the proper steps to have this and the other demands due by the company extinguished out of the assets of the company. In such event, the assignee should be made a party defendant.

I am no enemy to corporations. On the contrary, I look upon them as the *proof*, and in no small degree, the *cause* of the unparalleled advancement of modern civilization. Without them, many of our most magnificent works of internal improvement, which confer such prosperity and glory upon the country, would never have been undertaken. I am the friend of banks, founded upon the only honest principle of banking—the certain ability to meet their obligations promptly and according to their tenor. I am the friend of the credit system, given as the encouragement to honest enterprise and industry. But when we remember that the losses to the country within a few years, by the failure of banks, exceeded four hundred millions of dollars, as appears from a report of a former Secretary of the Treasury, and that too before the great explosion which scattered such wide spread ruin, and brought so much dishonor upon the country, we feel it to be a most solemn duty to guard with vigilance those checks which are designed and so well calculated to secure for paper currency a substantial basis to rest upon.

Decree reversed and the cause remanded for proceedings in conformity with this opinion.

No. 81.—DANIEL HIGHTOWER and others, plaintiffs in error, vs.
JOHN D. MUSTIAN, defendant in error.

- [1.] Creditors of an insolvent corporation, whose charter has been forfeited, and who have exhausted their legal remedies against it, may sue in Chancery for the assets of that corporation, and have them applied in payment of their debts.
- [2.] An assignment of assets of a bank, insolvent at the time, and about making a general assignment, and against which proceedings are pending to revoke its charter, made to a creditor cognizant of these things, and by collusion with him to defraud the other creditors: *Held*, to be void; and that the assets so assigned to him is a trust fund, to be applied to the payment of the debts of the corporation.
- [3.] A bill defective for want of parties, must, generally, be demurred to specially, and the demurrer must show who are the proper parties.
- [4.] A bill will not, generally, be dismissed for want of proper parties, but may be amended.
- [5.] Exception to this rule stated.

In Equity, in Muscogee Superior Court. Decision on demurrer, by Judge ALEXANDER, May Term, 1850.

This bill was filed by Daniel Hightower, and other judgment creditors of the Planters & Mechanics' Bank of Columbus, alleging, that in 1842, the said bank borrowed of one John L. Mustian, ten thousand dollars in bills of the Central Bank of Georgia, (which were worth at that time 75 cents to the dollar) for which they agreed to pay interest at the rate of 16 per cent. per annum; that at the time, the bank was largely indebted to complainants and others, far beyond its means and resources, and was then, and still continues to be, totally insolvent; that shortly thereafter, the bank went into liquidation, and assigned all of its assets to Robert B. Alexander, for the benefit of its creditors, and in a few days after the assignment, the charter was declared forfeited by the decree of the Superior Court of Muscogee County; that a few days before the assignment, and with a full knowledge of all the facts, John L. Mustian, combining and confederating with the bank to obtain a fraudulent and unjust preference over the other creditors, received in payment, or as security for his debt and the usury thereon, the sum of \$25,000 of the bills of the bank, which he has since converted to his own use; also a large num-

ber of solvent promissory notes, the property of the bank, together with the title deeds to a large quantity of land in Alabama, held by the bank as security for the payment of the notes—the exact amount of which notes, complainants were unable to specify. The bill charged distinctly three notes, amounting to more than \$22,000, and that Mustian had collected on the assets received by him, upwards of \$40,000. The bill charged the whole arrangement to be fraudulent and void.

The prayer was, that Mustian might be declared a trustee, and might be held to account for the assets received by him.

By an amendment to the bill, it was alleged that the complainants were wholly ignorant of the fraud charged in the bill, until day of November, 1848, and their bill was filed to the first Court thereafter; and that the proceedings to forfeit the charter were pending at the time the arrangement with Mustian was made, and was well known to him; and that at the time of the assignment, John Banks, as agent of the bank, agreed to pay Mustian 25 per cent. on his said loan, to be paid out of the said assets, until the same was paid.

To this bill, was filed a general demurrer for want of equity.

The Court sustained the demurrer, and this decision is brought up for review.

W. DOUGHERTY, for plaintiff in error.

H. HOLT, for defendant.

By the Court.—NISBET, J. delivering the opinion.

This bill was dismissed upon general demurrer, upon the ground, as the bill of exceptions states, "that the complainants showed by their own bill, that they were not entitled to the discovery and relief sought by the same." To the decision thus made, the complainants have excepted. The bill is filed by certain creditors of the Planters & Mechanics' Bank of Columbus, setting forth the ground of their claims, respectively, as creditors; that suits were instituted by them against said bank, judgments obtained, executions issued and returns of *nulla bona* made thereon; that said bank borrowed of the defendant, in 1842, ten thousand dollars in bills of the Central Bank of Georgia, which

ed fraudulent and void, and that he be declared a trustee of the assets so transferred, for the creditors, and account with the complainants and pay to them their claims, and the balance be disposed of as the Court may direct. Such is the bill.

[1.] That creditors of an insolvent bank, whose charter has been forfeited, may, in Equity, sue for and recover the assets of the bank, and by decree, have them applied in payment of their claims, I do not for a moment question. The proposition is supported by authority—is sustained by reason, and is of the most obvious expediency. This question was settled by this Court upon solemn argument, at the present term, in the case of *Hightower vs. Thornton*, which preceded this. To the opinion of the Court in that case, I refer, without more. If then, upon the demurrer, the Circuit Judge held, that the complainants are not entitled to the discovery and relief sought, because, in the case made by the bill, *they are not entitled to sue*, we hold that he was in error.

[2.] Conceding the right of the plaintiffs to sue, upon what other ground are they not entitled to the discovery and relief? I confess I am wholly unable to divine. Can the decision have gone upon the ground that there was no equity in the bill—that conceding all to be true which the bill charges, yet, upon principle, they are not entitled to relief? Let us examine the case, with a view to the equity in the bill. By what law is it to be controverted? Leaving out of the enquiry all those rules which govern conveyances and assignments to one creditor in fraud of the rights of others, I place this cause alone upon a special Statute of this State. It is in the following words: "All conveyances, assignments, transfers of stock, effects or other contract made by any bank, in contemplation of insolvency, or after insolvency, except for the benefit of all the creditors and stockholders of said bank, shall, unless made to an innocent purchaser for a valuable consideration, and without knowledge or notice of the condition of said bank, be fraudulent and void." *Prince*, 633. This Statute is so plain that it does not require a single word of elucidation. The only enquiry is this—do the averments in the bill bring the plaintiffs' case within its operation? They do, and go beyond its requirements. The bill charges that the complainants have exhausted their legal remedies against the bank—they have sued it to insolvency; that the corporation is insolvent, and was insolvent at the time the assignment to Mustian was made; that the officers

essary parties cannot be made. In that event, the bill will be dismissed. 3 Bro. Ch. R. 25. 7 Cranch's, R. 69, 99. Story's Eq. Plead. §§81, 86. We infer, then, (the bill being dismissed, the Court abiding the rule,) that there was no point made or decision had, as to defect of parties. Still, it appearing to us from the bill, that there was a general assignment, and the trust accepted, and farther, it being judicially known to us that the assignment and the designation of the assignee were affirmed, and Judge Alexander made the representative of the bank, by Act of the Legislature, we do not think it a departure from our duty to say, that he ought to be made a party, or some sufficient excuse be given why he is not made a party to this bill.

Let the judgment be reversed.

No. 82.—THOMAS STOCKS and others, plaintiffs in error, vs. VAN LEONARD and others, defendants in error.

- [1.] A bill by the creditors of an insolvent corporation, alleging a fraudulent combination and collusion between the assignee and debtors of the institution, to injure and defeat the creditors, makes a proper case for the interposition of a Court of Equity.
- [2.] In Courts of Equity, the Statute of Limitations does not begin to run in cases of fraud, until the discovery of the fraud.

In Equity, in Muscogee Superior Court. Decision on demurrer by Judge ALEXANDER, May Term, 1850.

The bill in this case was filed by Thomas Stocks and others, as judgment creditors of the Chattahoochee Rail Road & Banking Company, showing that they had prosecuted their legal remedy till a return of "*nulla bona*" had been made by the Sheriff; that the said company, being in failing circumstances, made an assignment of all its assets to Van Leonard and others, as general assignees, for the benefit of the creditors of the bank; that the assignees accepted the trust, and received property amounting to

Stocks and others vs. Leonard and others.

\$250,000; that, instead of collecting and appropriating them to the creditors of the bank, the assignees colluded and combined with the debtors of the bank, and allowed them to purchase the bills at a great discount, as low as 5 cents in the dollar, and with them pay off their liabilities to the bank; that the assignees had collected a small portion of the assets and appropriated them to their own use; that when called on by complainants to account for the manner in which they had discharged their trust, they refused to furnish any explanation or information, alleging that they had been advised by counsel not to do so, as it would furnish information upon which a suit might be instituted; the bill prayed for an account and decree.

By an amendment, the names of several debtors were included, who had fraudulently combined with the assignees to pay off their debts with the depreciated bills of the bank, and a decree was prayed, that they should pay the amount of their debts into Court, with interest thereon.

By a subsequent amendment, it was alleged, that the fraud charged in the bill came to the knowledge of complainants in the year 1848.

Hampton S. Smith and three other debtors of the bank, made defendants to the bill, demurred thereto for want of equity.

The Court sustained the demurrer, and dismissed the bill as to the defendants demurring, and this decision is assigned as error.

W. DOUGHERTY, for plaintiffs in error.

H. HOLT, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion:

This was a bill filed by Thomas Stocks for himself and in behalf of all the creditors of the Chattahoochee Rail Road & Banking Company of Georgia. It alleges, that in July 1841, the complainant held and owned the notes and bills of said corporation, amounting in all to \$580; that he instituted suits and obtained judgments for the same, upon which executions were issued on the 14th day of January, 1842; that the corporation being insolvent, a return of "*no property to be found*" was made thereon by

the proper officer, on the 18th day of April of the same year. The bill further charges, that the corporation being in failing circumstances, and desirous to discharge its liabilities equally and according to the principles of justice, without giving or showing a preference to any creditor over another, but to pay all alike, as far as the assets would enable them to do so, on the 17th day of July, 1841, transferred and assigned to Van Leonard, John Bethune and William P. Yonge, all of their real and personal estate, notes, bills of exchange, accounts and every other evidence of debt and species of property belonging to said corporation, in trust, for the creditors and stockholders. It alleges that the trust was duly accepted and the assignment placed upon the records, and that the said trustees might and ought to have realized and collected the sum of \$250,000, or other large amount, from said assets, *but that colluding and confederating with the debtors of the corporation, and for the purpose of injuring and defrauding the complainant and the other creditors, and to prevent them from collecting their debts, wholly and totally neglected and refused to collect a large portion of the corporation debts which were assigned to them, or to take any steps for that purpose, and that they permitted others to settle their debts in such a manner as they thought proper, by purchasing up, after the assignment was executed, the bills and debts of the corporation at a very great discount, as low as five cents on the dollar, and exchange the same for their own debts, and thus substituting those so purchased for the debts assigned as aforesaid, for the benefit of the complainant and the other creditors of the corporation.* The bill further charges, that the trustees collected some of the debts transferred to them, in good current funds, and applied them to their own use, and had wholly failed and refused to pay over to the complainant and the other creditors, any part or portion of the proceeds of said assets, property and effects in the assignment, and that when called upon to explain and account for the manner in which they had executed the trust, they refused to furnish any explanation thereof, or to give any information touching the same, assigning as a reason, that they had been advised by their counsel not to do so, as it would furnish matter upon which suit might be instituted.

By leave of the Court, several amendments, at sundry times, were made to the bill, in one of which it is stated, that application was made in the Spring of 1846, by William Dougherty, as

the attorney of the creditors, to William P. Yonge, one of the assignees, for an account and exhibition of his actings and doings as such, and for an inspection of the corporation books. Yonge admitted that he had the books, but refused to show them, under, as he alleged, the professional instruction of his attorneys; and the complainant assigns this as his reason and excuse for not knowing, because he had no means of knowing, until the answers of the assignees were filed, of the frauds and collusion charged in the bill, nor of the manner in which the debtors of the corporation settled with the assignees, which was in November, 1848, or about that time. The prayer of the bill is for an account of the trust fund and a settlement of the creditors' claims—the appointment of a receiver, &c.

To the bill, a general demurrer was filed, for want of equity, on the 10th of June last, by a portion of the defendants, namely: Hampton S. Smith, Harper & Holmes, Geo. W. B. Towns and William W. Garrard. There was also a plea of the Statute of Limitations interposed at the same time, and William W. Garrard insisted on his discharge in bankruptcy.

On the 20th of June, the cause coming up for argument, the solicitor for the complainant moved the Court to strike said demurrer and pleas from the record, on the ground that they were not filed at the proper time. As a reason and excuse for the delay, the defendants, by their solicitor, showed that the usual rule had not been taken in the case; and that the Court, at the November Term, 1849, did not sit but a few days, in consequence of the indisposition of the Judge, and was adjourned over to the Spring Term. The Court overruled the motion to dismiss the demurrer and pleas, and the solicitor for the complainant excepted.

The Court then proceeded to consider the demurrer, and after argument had thereon, sustained the demurrer and dismissed the bill; and to this decision, counsel for the complainant excepted, and now assigns the same as error.

Preferring, as we do, to have questions of practice determined by a full Court, we shall pass over the first exception taken in the Court below, especially as the adjudication of it is rendered unnecessary, for the present at least, by the view which we have taken of this case.

[1.] The only question, then, for the consideration of this Court

is, was there equity in the complainants' bill? The record does not disclose the grounds, and I am, I confess, at a loss to conceive how the Chancellor came to make a decree of the dismissal of the bill for want of equity. Some two or three hundred thousand dollars worth of property transferred by an insolvent corporation to assignees, for the payment of its debts nine years ago—no account rendered—all accounting refused when called for—the trustees charged with having received a portion of the funds and appropriating them to their own use—with failing and refusing to collect a large amount of the trust debts, or to take any steps for that purpose, and fraudulently combining and colluding with the debtors of the institution to settle their debts in such a way as would defeat the creditors! I must say, that were I to draw on my fancy, instead of the facts charged in the bill *and admitted by the demurrer to be true*, to frame a case which would address itself with peculiar force to the consideration of a Court of Equity, I should find it difficult to state it more strongly.

So far as the demurrants, who were the debtors of the corporation, are concerned, their liability is that of persons who deal with others holding a fiduciary character, and collude with them in violation of their trust. All such are deemed in equity *participes fraudis*; the trust is forced upon them, and they are compelled to perform it in the same manner as the trustee himself. The same doctrine is applied to them which governs the cases of executors and administrators, confederating with the debtors of the estate, either to retain or waste the assets. In such cases, the creditors will be allowed to sue the debtors directly in Equity, making the representative also a party to the bill, although, ordinarily, the executor or administrator only can sue for the debts due the deceased. *Gilbert vs. Thomas et al.* 3 Kelly, 575, and authorities there cited. *Worthey et al. vs. Johnson et al.* 8 Ga. Rep. 239.

[2.] As to the plea of the Statute of Limitations, it has become the settled rule of this Court, that in cases of *fraud* it does not begin to run until the party who is entitled to sue discovers the fact. *Omyers vs. Kenan & Hand*, 4 Kelly, 308. 8 Ga. Rep. 1. *Ibid*, 97. Here it is alleged in the amended bill, that the complainant did not acquire a knowledge of the transactions, upon which he seeks a recovery, until November, 1848, or about that time.

The judgment of the Court below must, therefore, be reversed, and the cause remanded for further proceedings.

No. 83.—EDWARD CAREY, assignee, &c. plaintiff in error, vs. SEABORN JONES and others, defendants.

[1.] In general, if a fact is charged in a bill which is within the defendant's knowledge, as if it is done by himself, he must answer *positively* and not according to his *remembrance* or *belief*. This is not an invariable rule, and every case must depend in some degree on its circumstances.

[2.] An exception to the rule is in cases where the fact charged is not recent, that is, has not accrued within six years. The answer in this case held sufficient.

In Equity, in Muscogee Superior Court. Exceptions to answer. Decision by Judge ALEXANDER, May Term, 1850.

This was a bill filed by Edward Carey, as assignee of the Bank of Columbus, against the stockholders of the Chattahoochee Rail Road & Banking Co. and alleged that Seaborn Jones and others became subscribers for stock, and held and owned certain shares in said company, going on to specify them; and then alleged "that the aforesaid persons were stockholders, each to the amount before stated, on the 1st day of April, 1841, and continued such until the corporation was dissolved in 1843."

Jones, in his answer, stated that he did promise in 1838 to subscribe for 300 shares of stock in the company, and to give a mortgage to secure the payment thereof, but according to his recollection and belief, he never did subscribe for the same or any number of shares, nor did he give any mortgage to secure the same, as the commissioners appointed failed to call on him for his subscription; that he never paid in any thing on any shares, and has no recollection that he ever subscribed for any shares.

This answer was excepted to as insufficient in not answering the allegations above recited. The Court overruled the exceptions, and this decision is assigned for error.

W. DOUGHERTY, for plaintiff in error.

H. L. BENNING, for defendants.

By the Court.—NISBET, J. delivering the opinion.

We are of the opinion that the answer is full enough, and that

the exceptions to it were well overruled. The charges in the bill said not to be answered, are the following: "The following persons, all of said County, became subscribers for stock, and held and owned five thousand, six hundred and forty shares in said company, in the following proportions, to wit: Seaborn Jones, three hundred shares."

This charge, to individualise it, is this: "Seaborn Jones became a subscriber for stock, and held and owned three hundred shares in said company."

Again the bill charges, "that the aforesaid persons (a long list of defendants named, and among them Col. Jones) were stockholders, each to the amount of shares before stated, on the 1st day of April, 1841, and continued to be stockholders until the said corporation was dissolved."

To individualise again, this charge is this: "The aforesaid Seaborn Jones was a stockholder to the amount of shares before stated, on the 1st day of April, 1841, and continued to be a stockholder until said corporation was dissolved."

The plaintiff in error contends that the former of these charges is not fully answered, and that the latter is not answered at all. Before adverting to the answer of Col. Jones, it will be well to enquire what is the law as to the fulness of answers in Chancery.

[1.] If a defendant does not demur or plead to a bill, he must answer. The plaintiff is entitled to a discovery from the defendant, of all matters charged in the bill, which are necessary or proper to ascertain facts material to his case, and to enable him to obtain a decree; and he must answer fully. What is a full answer, is not, and in the nature of the case cannot be, tested by any invariable rule. "In general," says Mr. Story, "if a fact is charged, which is within the defendants own knowledge, as if it is done by himself, he must answer positively; and not to his remembrance or belief, at least if it is stated to have happened within six years before." *Story's Eq. Plead.* §854.

In this case—the fact charged—the subscription to the stock of this company must be considered as within the knowledge of the defendant, because it is an act charged to be done by himself. The above general rule is, therefore, applicable to this case. As to recent facts within his knowledge, the defendant must answer positively, and not on belief. Writers, however, on Equity Practice admit that there is great practical difficulty on this head.

answering, says, that according to his recollection and belief, he never did subscribe for the same, or any number of shares, nor did he give any mortgage on any real or personal property to secure the payment of any shares, as the commissioners appointed to take subscriptions failed to call on this defendant to subscribe for the same, and to execute any mortgage to secure the payment of such subscriptions."

In the conclusion of his answer, he farther says, "that he himself never paid in any thing on any shares, and has no recollection that he ever subscribed for any shares," and these are all the responses of any kind made to the allegations of the bill, which I have before set forth. These responses, it is claimed, are not full enough to the first charge, and are no answer at all to the second. They are claimed not to be full enough, because upon recollection and belief, and not positively upon knowledge. The lapse of time will, in this case, justify an answer in this form, particularly when so full, as to explanatory facts and circumstances, as this is. It is not an impossible thing, that one engaged in various pursuits and conducting numerous forms of business, as Col. Jones, for ten years back, should find it impossible to swear positively about a transaction that must have transpired some ten or eleven years ago. With most men, no faculty is more treacherous than memory. Some regard must be paid to the conscience. Courts of Chancery will not force that, or force a party to hazard, unnecessarily, its violation. This answer seems on its face to be as full as the party can conscientiously make it—it seems not to be evasive—it develops facts in aid of its denial—it does not indicate any thing withheld. If this answer be contrary to the fact, there is as much perjury in it, as if it was positive upon the knowledge of the party. Whether it would be sufficient to dissolve an injunction, is a different question. We must believe that it is sufficient to overrule the exception founded on the first allegation in the bill above recited.

The second allegation, to wit: "the aforesaid Seaborn Jones was a stockholder to the amount of shares before stated, on the first day of April, 1841, and continued to be a stockholder until said corporation was dissolved," is claimed, by the plaintiff in error, to be a distinct, independent charge, that at that time, (April, 1841,) he was a stockholder, and continued so to be until the dissolution of the corporation, and requires a distinct answer. It is

No. 54.—Birdsong & Sledge, plaintiffs in error, vs. Peter McLaren, defendant.

[1.] Affidavits, under our attachment laws, should be signed by the Magistrate before whom they are taken, with the addition of their official description.

[2.] Where the attachment bond is made payable to the individual members of a firm, when the attachment itself is sued out against the firm, and it does not recite that the obligees compose said firm, the bond and attachment are both void.

Attachment, in Muscogee Superior Court. Tried before Judge ALEXANDER, May Term, 1850.

This was an attachment sued out by Peter McLaren, against the firm of Birdsong & Sledge. The affidavit was not attested by the Justice of the Peace, and the bond was made payable to Edward Birdsong and Nathaniel Sledge. The defendants appeared and entered their defence.

On the appeal, a motion was made to quash the attachment, on the ground that there was no affidavit or bond as required by law. The Court allowed the Justice of the Peace to enter his attestation, *sine pro tunc*, and overruled the objection to the bond. This decision is assigned as error.

There were other exceptions filed, but not decided in the Supreme Court.

W. DOUGHERTY, for plaintiffs in error.

H. FOLT, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] In *Jackson vs. Valentine*, (3 *Caine's Rep.* 128,) the Supreme Court of New York ruled that the jurats of affidavits taken before the Judges of the Common Pleas or Commissioners, must be signed by them, with the addition of their official subscriptions. Judges of the Common Pleas to style themselves such, and Commissioners to specify that they are so.

For myself, I believe that the paper purporting to be an affidavit

vit, wanting as it did the signature and official attestation of the Magistrate, was a nullity under the attachment laws of this State, and that it was not amendable.

[2.] But the other objection was fatal. The attachment was sued out by *McLaren* against the firm of Birdsong & Sledge, and the bond was made payable to Edward Birdsong and Nathaniel Sledge, as *individuals*, without reciting that the obligees composed said firm; whereas, the attachment law requires that before granting the attachment, the creditor shall give bond and security in double his debt, payable to the *defendant*. *Prince*, 31. And that all attachments issued and returned in any other manner, shall be null and void. *Ibid.* Now, the *defendant* is the firm of Birdsong & Sledge, and not Edward Birdsong and Nathaniel Sledge. I need not point out the legal consequences which would result from this discrepancy.

Let the judgment be reversed.

No. 85.—JOHN F. and ROBERT BOYD, administrators, &c. plaintiffs in error, *vs.* WILLIAM CLEMENTS, guardian, &c. defendant.

[1.] The 4th Common Law Rule of Practice is not applicable to causes in Equity.

[2.] When a cause in Equity is pending, and the pleadings are made up and the issues joined, the complainant is not entitled to amend, as a matter of right, but amendments will be allowed, in the discretion of the Court, upon special cause shown.

[3.] *Surprise* is good special cause for the allowance of an amendment.

In Equity, in Muscogee Superior Court. Tried before Judge ALEXANDER, May Term, 1850.

On the trial of this cause on the appeal, after the proofs and pleadings were submitted to the Jury, the complainants' counsel opened his case to the Jury, insisting on various errors in the returns of the intestate of Robert and John F. Boyd to the Court of

Ordinary, on the estates for which his administrators were now called to account. Defendant's counsel replied and insisted before the Jury, that under the pleadings, these errors could not be insisted on. Counsel for complainant then stopped counsel for defendants, and insisted on a verbal agreement dispensing with any such allegations in the bill, which being denied, counsel for complainant moved for a continuance, on the ground of surprise, in order that the bill might be amended. The Court granted the motion, and this decision is assigned for error.

The Court then granted an order, allowing the bill to be amended on the showing by counsel of his understanding of the verbal agreement; and this decision is also assigned for error.

G. E. THOMAS and W. DOUGHERTY, for plaintiffs in error.

H. HOLT, for defendant in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] The 4th Common Law Rule of Practice does not apply to causes in Equity, and the complainant was not entitled to an amendment in this case as a matter of right.

[2.] Amendments to bills pending on the appeal, are not allowable but in the discretion of the Court; and when the pleadings are made up, and the issues joined, that discretion will not be exercised to grant amendments but upon special cause shown. *Berry vs. Matthews*, 7 Geo. R. 457. *Georgia R. R. & Banking Co. vs. Milner & Co.* 8 Geo. R. 315.

[3.] In this case, the cause shown is *surprise*, and our judgment is, that the presiding Judge properly allowed the amendment, and also the continuance for the purpose of the amendment.

Let the judgment be affirmed.

No. 86.—**MARTHA H. FERGUSON** and others, by their next friend, **Asa Litch**, plaintiffs in error, *vs.* **JESSE CARTER** and others, defendants.

[1.] Where a bill is dismissed on demurrer for want of Equity, and a second bill is filed, charging the same facts, and praying substantially the same relief, the judgment on demurrer may be pleaded in bar of the second bill.

In Equity, in Muscogee Superior Court. Decision by Judge **ALEXANDER**, May Term, 1850.

In 1842, a bill was filed by Martha H. Ferguson, a *feme covert*, and her children, by their next friend, alleging that on the 21st day of September, 1838, Richard Christmas, the father of Mrs. Ferguson, knowing the insolvency of James Ferguson, the husband, and to secure a provision for his daughter and her children, executed a deed of gift of certain slaves to "Martha H. Ferguson and her lawful children;" that it was his wish and intention to give this property in such manner that the husband should derive no interest or benefit therefrom, and to the sole and separate use of the wife; and that from his ignorance as to the proper mode of framing the instrument, the same was a defective execution of his intention; that after the execution of the deed, the negroes were delivered to Martha H. Ferguson. The bill alleged that Jesse Carter and two other judgment creditors of Ferguson had levied on the negroes, and a claim had been interposed by the next friend of Mrs. Ferguson and children.

The bill prayed the appointment of a trustee, an injunction of Carter and the other creditors, and that Ferguson might be decreed to release to complainants any claim or interest he might have under the deed.

This bill was demurred to—first, because Richard Christmas should be a party—second, for want of Equity. The demurrer was sustained by Judge Wellborn, then presiding, on the second ground, and the bill dismissed.

In 1846, another bill was filed by the same complainant against Jesse Carter and other creditors not included in the first bill, Ferguson and the executors of Richard Christmas, alleging, substantially, the same facts, except that the defective execution of

the intention of Richard Christmas, by the deed, arose either from the ignorance of the draughtsman, or a misapprehension of the wishes of Richard Christmas. The prayer was for a reformation and correction of the deed, so as to carry out the intention of the grantor.

To this bill, Carter filed a plea of the decision on demurrer to the former bill, in bar to the bill so far as he was concerned. On demurrer to the plea, the Court overruled the demurrer and sustained the plea. This decision is assigned as ground of error.

STURGES, for plaintiffs in error.

B. HILL, for defendants in error.

By the Court. LUMPKIN J. delivering the opinion.

[1.] It seems that in 1838, Richard Christmas, the father of Martha H. Ferguson, made a deed of gift to her and her children, of four slaves. Jesse Carter and two other judgment creditors had these negroes levied on as the property of Ferguson, the husband of the donee. A bill was filed in 1842, in behalf of Mrs. Ferguson and her children, suggesting that it was the intention of the donor to create a separate estate in this property for the wife and children, free from the marital rights of the husband; and praying that inasmuch as the instrument was defectively executed, that by a decision in Chancery, the omission might be supplied, by appointing a trustee for Mrs. Ferguson, and compelling James Ferguson, the husband, to relinquish all his rights in the property, and the creditors be perpetually enjoined from proceeding against this property. To this bill a demurrer was filed—

1st. For want of proper parties, Richard Christmas, the donor, not having been brought before the Court.

2dly. For want of Equity.

Judge Wellborn, who was then on the Bench, waived the consideration of the *first* ground, and sustained the demurrer on the *second* ground, and dismissed the bill. His opinion is spread upon the minutes of the Court, and has come up as a part of the transcript of the record. And from that, it appears that he held that it was inadmissible, by parol proof, to reform the deed of gift, and thereby make it speak a language different from its face.

Another bill is now filed in behalf of the same complainants, and, as we think, substantially for the same object. It is, to have the instrument reformed, and Carter, one of the creditors, and who was a defendant in the original bill, restrained from collecting his debt out of these negroes.

A plea of former recovery having been put in by Carter to this last bill, it was demurred to, and the demurrer overruled. In other words, the Circuit Court held that the plea was a good bar.

The object in both bills is the same—the allegations substantially so. It is true, that to the first bill, Richard Christmas is not made a party, and it was demurred to on that account. But the record establishes the fact, that the Judge before whom the cause was heard, waived this ground, and dismissed the bill for want of Equity.

It is argued that this opinion makes no part of the transcript. But even in its absence, we should be bound to presume what it affirmatively shows—namely, that the bill was dismissed on this account, the want of proper parties being no sufficient cause for dismissing a bill. For if the necessary parties can be made, the Court will always give leave for that purpose, either by an amendment or by a supplemental bill; when substantial justice between the actual parties to the suit, requires it. *Story's Eq. Pl.* §§237, 884. *Milligan vs. Mitchell*, 1 *Mylne & Craig*. 433. *Mitf. Eq. Pl. by Jery*. 326.

It is true, that in the first bill the prayer is not in so many words, that the conveyance be reformed, but it seeks to accomplish the same object by decreeing that a trustee be appointed, that the husband relinquish to him, and that Carter and the other two creditors be enjoined. So far as Carter and these parties, then, are concerned, the issue of law involved in this litigation, has been decided on its merits. See *Saunders' Plead. and Ev.* 612, 613, where all the authorities upon this subject are collected.

Now, whether the judgment rendered upon the demurrer to the first bill was right or wrong, we are not permitted to inquire. It is enough for us that it was decided by a Court of competent jurisdiction, and that the judgment remains unreversed.

It only remains to affirm the judgment of the Superior Court overruling the demurrer to the plea.

No. 87.—A. J. ROBISON and others, plaintiffs in error, vs. EDWARD CAREY, assignee, defendant in error.

[1.] A bill is filed by the assignee of a bank, against a number of the stockholders of another insolvent bank, to compel said stockholders to contribute rateably, under a clause in the charter, which makes them personally liable for the bills in circulation; and also to appropriate the amount of stock subscribed by them and unpaid, to the payment of debts due by the latter institution to the former, as a trust fund in their hands, and is demurred to upon the ground that the complainant has an adequate Common Law remedy: *Held*, that the bill is not demurrable on that ground.

[2.] *Held*, farther, that in such a case, a demurrer, that the liability of the stockholders is several and not joint, is not warranted by the bill, it seeking to charge them severally and not jointly.

In Equity, in Muscogee Superior Court. Decision on demurrer by Judge ALEXANDER, May Term, 1850.

The bill in this case was filed by Edward Carey, assignee of the Bank of Columbus, against John Banks and others, as stockholders in the Planters & Mechanics' Bank of Columbus, to hold them liable for the redemption of certain bills, (held by the Bank of Columbus,) under the 11th section of the charter of the Planters & Mechanics' Bank; also, to compel the stockholders to pay in a balance due on their original subscription for stock, as a fund out of which other claims held by the Bank of Columbus against the Planters & Mechanics' Bank, might be paid.

A demurrer was filed on various grounds, and overruled by the Court below, and made grounds of error in this Court; all of which, however, having been decided during this term, were abandoned, except the following:

1st. That the complainant had an adequate Common Law remedy.

2d. That the liabilities of the defendants are individual, several, and separate, and not joint.

Jos. STRACAS, for plaintiffs in error, submitted—

1st. That there is no equity in the bill of defendant. See *Prince*, 125, §§2, 3; also, *4th Rule*, page 127; also, §11, page 127.

2dly. The members of the corporation irresponsible for the

corporate debts beyond their interest in the corporate fund. See *Angell & Ames on Corporations*, pages 25 and 26 and 670.

3dly. That the defendants have an ample, complete and adequate remedy at Common Law. See *Prince's Digest*, 127.

4thly. That by judgment of forfeiture, the stockholders are not liable to pay additional sums upon their stock already paid in. See *Angell & Ames*, 128, 129; also, 470, 476. Also, as to the right of the directors to assess. See *Angell & Ames*, 420, 421, and 422. 6 *Mass. R.* 40. 14 *Mass. R.* 286. *Prince*, 125.

5thly. That the stockholders are only liable, individually, for the ultimate redemption of bills and notes alone. See *Prince*, 127.

6thly. That the corporation being dissolved, a Court can make no other decree than is provided by Statute. See *Angell & Ames*, 667, 668. 2 *Kent*, 246, 247.

W. DOUGHERTY, for defendant in error.

This is a case of apportionment and contribution, and therefore properly brought in Equity. 1 *Mad. Ch.* 232. 1 *Story's Eq.* §§469, 470. *Angell & Ames*, 564.

By going into Equity, a multiplicity of suits is avoided; this gives jurisdiction. 1 *Story's Eq.* §§64, 67, 478, 483. *McLaren vs. Steap*, 1 *Kelly*, 376.

But we say, that independent of any statutory liability, we are entitled to the relief asked for, because the capital stock of the F. & M. Bank is in Equity, a trust fund for the payment of the debts of the Bank, and may be pursued by the creditors in Equity into the hands of any person holding the same, who is not a purchaser for value, without notice, and this can only be done in a Court of Equity. 2 *Story's Eq.* §1252. *Angell & Ames on Corporations*, 540 to 546. *Wood et al. vs. Dummer et al.* 3 *Mason*, 368. 1 *Kyd on Corp.* 273. *Briggs vs. Penniman*, 8 *Cowen*, 387. *Slas vs. Bloom et al.* 19 *John.* 456. *Hadlet vs. Wertherspoon et al.* 2 *Richardson's Eq. Rep.* 395. *Allen vs. Montgomery & West Point Co.* 11 *Ala. Rep.* 473.

The right of the creditors to ask in Equity for the execution and enforcement of this trust, is not impaired nor affected by the dissolution of the corporation, but it survives the dissolution, and those holding the property on which it attaches are trustees for the creditors. 2 *Story's Eq.* §1252. *Blackney vs. Farmers &*

Robison and others vs. Carey.

Mechanics' Bank of Greenacastle, 17 *Serg. & Rawle*, 65. *Lindell vs. Benton & Kennedy*, 6 *Miss.* 384. *Mumma vs. Potomac Company*, 8 *Peters*, 261. *Nevitt vs. Bank of Port Gibson*, 6 *Smede & Marshall*, 557.

But suppose this be not true, yet we say that the Common Law rule in relation to this corporation has been repealed or changed by the Act of 1842. See *Acts of 1842*. *Nevitt vs. Bank of Port Gibson*, 6 *Smede & Marshall*, 557, on application for rehearing. *Hall vs. Carey*, 5 *Kelly*, 239.

The capital stock of the bank, and the value of the shares thereof, is fixed by the charter, and the stock subscribed and agreed to be paid into the company, is corporate property. *Prince's Digest*, 126. *Angell & Ames*, 569. *Briggs vs. Penniman*, 8 *Cowen*, 296, opinion of *Spencer, Senator*. *Allen vs. Montgomery & West Point Co.* 11 *Ala. Rep.* 437.

If, then, we are correct in the foregoing propositions, it follows that the complainant has the right to ask for a contribution from the defendants, under and in virtue of the terms of the charter, for the payment of his debt, *pro rata* their interest in said corporation.

And also that the capital stock in the hands of the defendants, or so much thereof as may be necessary, may be applied to the discharge of said debt.

By the Court.—NISBET, J. delivering the opinion.

The great questions made by the demurrer in this case, as to the liability of the stockholders in insolvent banks, were abandoned in the argument, because previously discussed in different cases at this term. I refer to those cases for the judgment of this Court, on those interesting questions, and proceed to notice two points made in this case.

[1.] The first is, that the complainant has an adequate remedy at Law, and therefore has none in Equity.

This is a bill brought by the assignee of the Bank of Columbus against certain of the stockholders of the Planters & Mechanics' Bank, to compel them to pay up the amount unpaid on their stock, or so much thereof, rateably, as may be necessary to satisfy the demands of the Bank of Columbus against the Planters & Mechanics' Bank, or that they be decreed to pay such proportion of the debts due to the complainant, as assignee of the Bank

of Columbus, as the stock held by them respectively, bears to the whole stock of the Planters & Mechanics' Bank.

The demands claimed in the bill are founded on the bills of the Planters & Mechanics' Bank, and also other evidences of debt, as certificates of deposit. It goes, therefore, upon the personal liability of the stockholders, under the 11th section of the charter, for the demands due on the bills held by the complainant; and it goes also upon the stock unpaid by the stockholders for the demands due on those bills, and demands due on other accounts, as set forth in the bill. Hence, the double aspect of the prayer of the bill, as above set forth.

The bill-holders, no doubt, can proceed at Law, each in his several action, to compel the stockholders to pay, under the 11th section; for that section makes them liable, as "in common actions of debt." This remedy is provided by the charter. *Prince*, 127. But it does not follow, that because a bill-holder may sue at Law, he must sue at Law. The remedy at Law, in many cases, as in this, would be inadequate. The liability by the charter is "in proportion to the amount of shares, and the value thereof, that each individual or company may hold." It is, therefore, a case for apportionment and contribution; and such cases belong to the jurisdiction of a Court of Chancery. 1 *Maddox's Ca.* 232. 1 *Story's Eq.* §§469, 470. *Angell & Ames on Corporations*, 564.

Again, Equity will take jurisdiction, in order to avoid a multiplicity of suits. The remedy at Law would be an action against each stockholder, and in each suit, the plaintiff would recover only that stockholder's proportion of the common liability. Hence, to collect his debt, he might be driven to a number of actions. The debts due to the complainant in this bill, are large in amount. A number of the stockholders, indeed all, as the bill avers, who could be made parties, are brought before the Court, and a multiplicity of suits is avoided. On this account, the bill is sustainable. 1 *Story's Eq.* §§64 to 67, 478, and 483. 1 *Kelly*, 376.

But this bill goes upon another and distinct ground for the recovery of all the debts due by the Planters & Mechanics' Bank to the Bank of Columbus, whether by bills or otherwise. It goes upon the ground that the capital stock of the P. & M. Bank is an equitable or trust fund, for the payment of its debts, and that the unpaid stock is a part of the capital stock, and may be followed in the

hands of any person holding the same, who is not a *bona fide* purchaser, without notice. This proposition, so important to sound banking and to the prosperity of the State, this Court has held already at the present term, and is now affirmed. I enter not into the discussion of it, because it has not been questioned in this case, but refer to the cases in which it was discussed. This being true, the remedy is only in Equity. This bill is filed to reach this trust fund—to appropriate a trust fund in the hands of the defendants, as stockholders. In this aspect, it seeks not to charge them personally as for a debt due by them, but to charge each and every of them as trustees, holding a fund liable to the debts of the creditors of the corporation. 2 *Story's Eq.* §1252. 17 *Serg. & Rawls*, 65. 6 *Mississippi R.* 364. 8 *Peters*, 281. *Nevitt vs. Bank of Port Gibson*, 6 *Smede & Marshall*, 537. *Ang. & Ames on Corp.* 540. to 546.

The demurrer to the bill, therefore, upon the ground that the complainant has an adequate Common Law remedy, was, in our judgment, properly overruled.

[2.] The other ground of demurrer, insisted upon, and the only other ground is, that the liabilities of the defendants are individual, several and separate, and not joint.

The bill does not charge the defendants as jointly liable to the plaintiff for the whole of his debts. It does not assume that they are liable, *but rateably*, and seeks to recover rateably against each. If this ground goes upon the idea that the bill makes or seeks to make the defendants liable as joint contractors, it is not warranted by the bill. The bill seeks to charge them, as the demurrer demands, separately and severally. In this view of it, all that has been already said is applicable to this demurrer, and it also was well overruled as not being warranted by the case made in the bill.

Let the judgment be affirmed.

No. 88.—LEROY M. WILEY & Co. plaintiffs in error, vs. NATHANIEL SLEDGE.

[1.] An attachment, *ordinarily*, cannot issue for a partnership debt, against one of the partners, individually, and be levied on the partnership property, on the ground of the non-residence of the defendant in attachment. *Scias*, if the non-resident partner or partners were the only survivors of the firm.

Attachment, in Muscogee Superior Court. Decision by Judge ALEXANDER, May Term, 1850.

This was an attachment sued out by L. M. Wiley & Co. against Nathaniel Sledge, one of the partners of the firm of Birdsong & Sledge, on the ground that Sledge was actually removing beyond the limits of the State. There was a verdict for plaintiff and appeal. Defendant, by his counsel, then moved to quash the attachment on various grounds which were sustained by the Court and excepted to by plaintiffs.

The only ground relied on in the Supreme Court is, that an attachment will not lie against one partner for a partnership debt.

H. HOLT, for plaintiffs in error.

W. DOUGHERTY, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The only question in this case is, whether, when one of the members of a firm, transacting business in Georgia, resides out of the State, an attachment will lie against him on a firm debt, to be levied on the partnership effects?

The case is not without its difficulties. We think, however, that the attachment will not, *ordinarily*, lie.

This summary remedy is allowed only against the *debtor* of the plaintiff in attachment. Here the *debtor* is the *firm* of Birdsong & Sledge, and not Nathaniel Sledge, individually. For this simple reason alone, it would seem that this proceeding could not be sustained. It is not authorized by the language of the law.

Partners must be sued jointly; and while there is no process

of *oullavory* in civil cases in Georgia, the return of *non est inventus* has, under the Act of 1820, (*Prince*, 445,) pretty much the same effect. Still, the action must be *joint*. — An attachment is a suit. Why should the plaintiff be permitted, in this form of proceeding, more than by ordinary process, to go against one partner separately?

In Alabama, it has been decided that a *non-resident* partner may be attached, although there is one of the firm resident in the State. *Woriston vs. Ewing*, 1 *Ala. Rep.* 129. *Greene vs. Pyne*, *Ibid.*, 235. *Conklin vs. Harris*, 5 *Ala.* 213. But these cases are put by the Court upon the attachment law of that State, which makes the debts of partners *joint* and *several*, allowing a remedy against either. *Aikin's Digest*, 268.

The remedy by attachment is allowed in this State, because the ordinary process of law cannot be served on the debtor. If personal service can be effected, then the attachment cannot issue. Here, notwithstanding the non-residence of one of the firm, suit, under the Act of 1820, can be prosecuted to judgment against the partners who live in the State, and the judgment will bind the partnership effects, as well as the individual property of the partners who are served.

A debtor may fraudulently remove his property from the State, for the purpose of defeating his creditors, yet if he remain himself, an attachment will not lie; and why? Because a *ca. sc.* would coerce the surrender of the property thus eluded.—The same result could be obtained by ordinary suit against the resident partner.

The law may be defective in not providing for this case, as has been done in our sister State. It is not for us to remedy the evil.

We do not hold that a state of things might not exist which would authorize an attachment against one or more *non-resident* members of a firm on a copartnership contract—as for instance, the death of the resident partner or partners. Suffice it to say, that the record presents no such circumstances.

Judgment affirmed.

**No. 22.—THE MUTUAL BENEFIT LIFE INSURANCE COMPANY,
 PLAINTIFF IN ERROR, vs. JOHN C. RUSE.**

It is shown that the plaintiff makes insurance of the life of A at the instance of B. The policy is so stipulated that the premiums shall be paid on the 10th of April every year, and that if they were not then paid, the company should not be liable for the insurance, or any part thereof, and the policy should cease and determine. Printed proposals, purporting to be the terms and conditions of insuring, were put out by the company to persons dealing with them, one article of which was that a party neglecting to settle his annual premium within thirty days after it is due, forfeits the interest he has in the policy. No reference is made in the policy to the printed proposals. The premium due on 10th April 1847, was not paid at that time; the insured died four days thereafter, and after his death, and within the thirty days, the premium then due was tendered and refused by the company: Held, that the article in relation to the thirty days does not extend the contract of insurance beyond the time designated in the policy for the payment of the premium, and that the company, according to the facts of this case, are not liable.

Attachment, in Muscogee Superior Court. Tried before Judge ALEXANDER, May Term, 1850.

On the 13th of July, 1846, the Mutual Benefit Life Insurance Company issued to John C. Ruse a policy of insurance upon the life of Ira D. Bugby, for the sum of \$2000, at an annual premium of \$97 40, "to be paid on or before the 10th day of April in every year," and reciting, that "in case the said John C. Ruse shall not pay the said annual premium on or before the several days hereinbefore mentioned for the payment thereof," then the policy to be void.

By the "prospectus," &c. contained in a printed pamphlet delivered by the agents of the company to persons insuring, as containing the conditions on which insurance could be effected, it was stated under the head of "Forfeiture of Policy," as follows: "A party neglecting to pay his premium within thirty days after it becomes due," forfeits the interest he has in the policy.

On the 14th of April, 1847, four days after the annual premium became due, Ira D. Bugby died, and a few days thereafter, before the expiration of the thirty days, the annual premium was tendered to the agent of the company, and refused by him.

Ruse sued out an attachment against the company, and on the

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trial of this case, the questions were made which are brought up for review.

The facts above stated were in evidence, when plaintiff tendered the printed pamphlet referred to above. Objected to by counsel for defendant; and objection overruled. This is the first error assigned to the decisions of the Court below.

The Court was requested by counsel for plaintiff below to charge the Jury that the pamphlet in evidence proved that the party was allowed thirty days in which to pay the premium. The Court declined so to do, but said that the language was equivocal, and that he would refer it to the Jury for their own construction.

The Jury found a verdict for plaintiff; whereupon defendant's counsel moved for a new trial—

1st. Because the Court erred in admitting the pamphlet in evidence.

2d. In refusing to charge as requested by plaintiff, and in charging as stated.

3d. Because the verdict of the Jury is contrary to law and evidence.

The motion was refused, and error is assigned thereon.

H. HOLT, for plaintiff in error, cited the following authorities in support of the errors charged in refusing the new trial, on all the grounds taken in the *rule nisi*:

1 *Phil. on Ins.* 24 to 30, inclusive. 2 *Phil. on Ins.* 730 to 732. 13 *Mass. R.* 96, *Higgenson vs. Dall.* 2 *Cain's R.* 155, *Vanderboort and another vs. Smith*, *Pres't Col. Ins. Co.* 2 *Johns. Rep.* 346, *Cheriot vs. Barker.* 5 *Pick.* 37, *Parks et al. vs. General Interest Ins. Co.* 1 *H. Black.* 254, *Routledge, ex'r of Routledge, vs. Burrell and another.* 2 *H. Black.* 574, *Wood et al. vs. Wooley.* 6 *T. R.* 710, *same case in error.* 5 *T. R.* 695, *Tarlton et al. vs. Standiforth et al.* 6 *East. Rep.* 571, *Salvin et al. vs. James & Langston.* 12 *East. Rep.* 183, *Want & Gaskoin, ex'rs of Want, vs. Blunt et al.* 7 *M. & W.* 151, *Acey and another, ex'rs of Simpson, vs. Br. Com. Ins. Co.* 6 *Wend.* 488, *Duncan vs. Sun. Fire Ins. Co.*

H. L. BENNING, for the defendant in error, relied upon the fol-

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lowing authorities : Authorizing the admissibility of the evidence, and the finding of the Jury, viz :

See 1 *Phillips on Insurance*, 30. *The Es'rs of Want vs. Blount and others*, 12 *East*. 182. 6 *East*. 571. 5 *Term Rep.* 695. *Greenleaf's Ev.* 405. 12 *Wheaton*, 515. 4 *Coven*, 645.

To show that the rule under the prospectus, allowing thirty days are similar to days of grace, and as to rule allowing days of grace, referred to *Bailey on Bills*, 235. 9 *Wheaton*, 581. 1 *Peters*, 25. *Bailey on Bills*, 243. 4 *Mass. R.* 345. 6 *Mass.* 449. 17 *Mass. R.* 449. 9 *Pick.* 420.

As to the construction of policies. 2 *Binney*, 373. 1 *Burrows*, 349. 12 *Wheaton*, 383. *Marshall on Ins.* 2 vol. 796.

By the Court.—NISBET, J. delivering the opinion.

[1.] The errors assigned grow out of the refusal of the Court below to award a new trial at the instance of the defendant below. The specifications of error are, the grounds taken in the rule for a new trial. But counsel for the plaintiff in error relied, before this Court, only upon two of those grounds, to-wit :

1st. Because the Court erred in permitting said pamphlet, or any portion thereof, to be read in evidence on the trial of said case.

2d. Because the Court erred in this, that when the attorney for the plaintiff requested him to charge the Jury that the pamphlet in evidence proved that the party was allowed thirty days in which to pay the premium, the Court refused, saying that the language was equivocal, and that he would refer it to the Jury for their construction.

The pamphlet referred to, purports to be the rules and regulations of the plaintiff in error—"The Mutual Benefit and Life Insurance Company." It contains numerous statements or rules, which relate to the business and the manner of conducting it, of that company. It does not appear to have been published by the authority and direction of the company; but it was proven that pamphlets of like character with this, were handed out, at different times, by the company, to persons wishing to deal with them, and making enquiry as to the terms, &c. of insurance. In this pamphlet, among other things, is the following article : "A

party neglecting to settle his annual premium within thirty days after it is due, or paying assessments within sixty days, as specified in the charter, or refusing to give satisfactory security upon the note, forfeits the interest he has in the policy."

The plaintiff below read in evidence the policy, by which the premiums are stipulated to be paid annually on the 10th of April, and in which it is further stated, "in case the said John C. Russ (who was the party who had insured the life of a Mr. Bagby) shall not pay the said annual premiums on or before the said several days hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine."

It was farther in evidence, that Bagby, the person whose life was insured, died on the 14th day of April—four days after the time when, by the policy, the premium was payable, and that after his death, and within the thirty days, the premium was tendered, which was due on the policy on the 10th of April preceding, and refused by the company. Under these circumstances, the pamphlet referred to, and more particularly that portion of it before recited, was admitted in evidence for the plaintiff below.

The manner in which the second ground of error is stated in the record, is somewhat equivocal. The language of the rule is to the effect that the Court erred in this—that when counsel for the plaintiff requested him to charge the Jury that the pamphlet in evidence proved that the party was allowed thirty days in which to pay the premium, the Court refused, saying *that it was equivocal, and that he would refer it to the Jury for their own construction*. Now, it is hardly to be presumed that the plaintiff intended to bring before this Court, as error, the refusal of the Court to charge a proposition at the request of the other side, which he maintains is unsound. The refusal of the Court thus to charge, was negatively in his favor, and he would not except to a decision in his own favor. Such exceptions and alleged error would reach no point in the first instance, and would be abused in the second. I apprehend that the real ground of error, is the refusal of the Court to put the true legal construction upon this *thirty day clause* in the pamphlet, but left that to the Jury, in saying to them, *it was equivocal and for their construction*. The question made by these assignments is this: *what, in the state of this case,*

is the legal effect of this clause in the printed pamphlet? This is clearly a question for the Court. He ought to have instructed the Jury as to the law which should govern the rights of these parties arising under this policy, and the facts proven, and this article of the pamphlet. He did not do so—but left the construction to the Jury. The defendant had a right to complain of this, for the pamphlet being in evidence, the Jury was bound to believe that it was legally before them. If, in law, the obligation of the defendants to pay the insurance is not affected by this clause in the pamphlet, why then, the admission of it in evidence, and the failure to instruct the Jury as to its legal effect, was a virtual ruling against the rights of the defendants. Upon the hearing of the cause we thought that there was no error in the admission of the pamphlet, it being put out as the terms and conditions of insurance, by the defendants, and, on that account, to be considered by the Jury subject to the control of the Court, in its right and obligation to pronounce upon its effect in law upon the policy. Upon looking into the authorities, I am satisfied that we were in error, and, for myself, I now correct it. I am now convinced that its admissibility depends upon its effect on the contract, and if, as we hold, it does not vary the policy, so as in any way to affect the liability of the company thereon, it was not admissible. This question becomes immaterial, as the judgment we pronounce upon the clause in the pamphlet will control the cause, so far as that clause is concerned with it. My correction, therefore, of what to me appears to be an error, does not at all interfere with the judgment of the Court, as pronounced at the hearing. Its discussion, however, is of some importance, for the reasons which exclude the pamphlet as evidence, shed light upon the construction which we give to it.

The position of the plaintiff below, is, that this pamphlet, being promulgated as containing the terms and conditions upon which the company insures, they are bound by it—its declarations entering into, and constituting a part of their contracts of insurance, and that the meaning and legal effect of the thirty day clause or rule, are, that if the premium is paid or tendered at any time within the thirty days, it extends the contract, so as to hold them liable for the insurance, even where, as in this case, the insured dies after the time stipulated in the policy for the payment of the premium, and before the tender or payment. I do not mean to say,

that in no case, and for no purpose, would this pamphlet be admissible. In this case, it is inadmissible, because it cannot be construed so as to enlarge or extend the terms and obligations of the contract as contained in the policy.

It is to be noted that the policy contains *no reference whatever to the pamphlet*—of course none to that part of it now being considered.

It is farther to be noted that the policy expressly provides that the premiums shall be paid *annually*, on or before *the 10th day of April*, in every year during its continuance.

And it is also to be carefully noted, that the policy explicitly declares, that if the premiums are not paid on or before the 10th day of April, annually, *the company shall not be liable to the payment of the sum insured, or any part thereof, and the policy shall cease and determine*. What then, is the contract as declared in the policy? It is, that for the premium expressed, the company insures the life of Mr. Bugby, at the amount (\$2000) stipulated. The contract is from year to year, and dependent for its continuance upon the payment of the premium on or before the 10th day of April in every year. This is necessarily the duration of the contract, because of the express declaration, that if the premium is not paid on or before that day in every year, the company shall not be liable, and the policy shall cease and determine. This policy, then, was of force up to the 10th day of April, 1847, the premiums anterior to that date being paid. The premium due on that day not being paid, the policy on that day ceased and determined. At and after that day, there was no contract between the parties. Bugby was not insured, and from thenceforward the parties stood relatively to each other, as they did before any contract had been made. Bugby, the insured, dying subsequently to that day, his insurer had no more right to call upon this company for the insurance, than upon any other company or citizen. Such is clearly the truth, as to this contract, found in the policy itself. Indeed, the plaintiff does not pretend to rely upon the policy alone—his reliance is upon the pamphlet connected with the policy. There is no rule of evidence better established, than that parol evidence shall not be admitted to disannul, or substantially vary, or extend a written agreement. *Oh. Kent on N. Y. Ins. Co. vs. Thomas, 3 Johns. Cases, 4.* There are exceptions, it is true, as in case of an *ambiguities latus*. I shall not

consider the exceptions, except so far as they relate to policies of insurance. Now, so far from the rule being relaxed in cases of contracts of insurance, it applies to them, "particularly and emphatically." 3 *Johns. Cases*, 4. *Skinn.* 54.

"Policies, (says Ch. Justice *Parker*,) though not under seal, have nevertheless ever been deemed instruments of a solemn nature, and subject to most of the rules of evidence which govern in case of specialties. The policy itself is considered to be the contract between the parties, and whatever proposals are made, or conversations had, prior to the subscription, they are to be considered as waived, if not inserted in the policy, or contained in a memorandum annexed to it." *Higginson vs. Dall*, 13 *Mass.* 96.

Whatever is contained in the policy, or written upon it at the time of signing, is a part of the contract, and is adopted by the signature, whether the words are in the margin, or put in by consent after signing, or written transversely, or indorsed. 3 *Esp.* 121. 1 *T. R.* 343. 7 *Johns. R.* 527. 1 *Caines*, 60. *Doug.* 12, *note*.

Now, if this policy had referred to this printed pamphlet, it would have become thereby a part of the contract. So are the authorities. 1 *H. B.* 254. 2 *Ibid.* 577. 6 *T. R.* 710. 5 *Ibid.* 695. *S. C.* 1 *B. & P.* 471. 3 *Anstr.* 707. From which affirmative proposition, logically, it follows, that if the printed proposals are not referred to, they are no part of the contract.

If, by mistake, the policy is so framed as not to correspond with the previous agreement of the parties, Equity will correct and reform it, as in case of other contracts. 1 *Duer on Ins.* 71, 73.

Again, if the terms used in the policy, or representations made to the insurer, have, by the *known usage of trade*, and the *practice as between the insurers and the insured*, acquired an appropriate or commercial sense, they are to be construed according to that sense. All mercantile contracts, if *dubious* or *made in reference to usage*, may be explained by parol evidence of the usage. "But the rule (says, Ch. *Kent*,) is checked by this limitation,—that the usage, to be admissible, must be consistent with the principles of law, and not go to defeat the essential provisions of the contract." 3 *Kent's Com.* 260. 7 *Johns. R.* 385. 12 *Whart.* 383. 3 *Bing.* 61. 6 *Pick.* 131. 1 *Hall's N. Y. R.* 619.

The plaintiff in this suit can bring his case within no one of these qualifications of the rule. There is no latent ambiguity in this policy—no interlineations—marginal or transverse writing—or indorsements—no reference to printed proposals, rules, or regulations—no pretence, that by mistake, it is not drawn according to the previous understanding of the parties. It is, however, insisted that this contract is to be construed in the light of the usage indicated in the rule in the printed pamphlet, and that it ought, therefore, to have been admitted in evidence. It does not indicate a *mercantile* usage. If admissible at all, it must be upon the idea, that it proves an usage or practice between the insurers and those who deal with them. Let it be so considered. When, and under what circumstances is such an usage proveable? Answer—

1st. When terms are used in a policy, or representations are made to the insurer, which have, by usage, an appropriate commercial sense, they are to be understood in that sense, and the usage may be proved. In this case, no question is made about the construction of words in the policy, or about representations made to the insurers. The whole question grows out of the extensive independent article, as found in the printed proposals.

2d. The usage is proveable only when there is *ambiguity* in the policy. Here there is none. It is as clear as the light of day: The parties have expressed their meaning with unmistakable perspicuity, and having so expressed themselves, they are to be considered as agreeing to be bound accordingly, and as having expressly excluded all *aliunde* facts, circumstances and usages. I find the doctrine upon this head very clearly stated by Mr. J. Story, in the case of the schooner *Reeside*. "The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word or words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject matter to which they are applied. But I apprehend it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and a fortiori not

pay the sum of £7 10s. at the time and places designated, and the defendants should agree to accept the same, their funds should be liable to pay the damage which the plaintiff might suffer by fire, "according to the exact tenor of their printed proposals, dated Jan. 1st, 1777." In those printed proposals was the following article: "On bespeaking policies, all persons are to deposit 9s. 6d. for the policy, stamp duty and mark, and shall pay the premium to the next quarter day, and from thence for one year more, at least, and shall, as long as the managers agree to accept the same, make all future payments, *annually*, at the said office, *within fifteen days after the day limited by their respective policies, upon forfeiture of the benefit thereof*, and no insurance is to take place until the premium be actually paid by the insured, his, her or their agent or agents." It was averred in the declaration, that the policy stipulating for semi-annual payments of the premium came under the article above quoted, although that speaks of annual payments. It then stated the plaintiff's loss by fire, after the making of the policy, and whilst it remained in full force, to-wit: on 11th December, 1789, and before the expiration of fifteen days after the day limited in the policy, and before any refusal by the company to accept the £7 10s. every six months, according to the effect of the policy. The declaration farther charged, that it was the true intent and meaning of the policy, that the plaintiff should be insured against losses happening within fifteen days after the day of payment designated in the policy, if plaintiff tendered it within that time, unless before the loss the company had refused to renew the policy; that all the premiums had been paid, except the last, at the day, and that was tendered before the expiration of fifteen days from the day of payment designated in the policy. One of the pleas was, that the premium of £7 10s. was not tendered until after the 10th December, 1789, the day of payment named in the policy, which was demurred to, and thus the point was made as to the effect of the article extending day of payment for fifteen days.

Lord *Kenyon*, Ch. J. said, "it was admitted in the argument, that the insurance when made, *did not extend to half a year and fifteen days, and that completely puts an end to the whole case*. By the agreement under which the plaintiffs were insured, they stipulated that they would pay half yearly—namely, on 10th June and 10th December, the sum of £7 10s. and that they would, so

sure against fire, goods already burned, or the life of a man already dead, will readily strike the commonest mind. In the case decided by Lord Kenyon, the article was referred to in the policy, and as he held, and as all the authorities hold, became thereby a part of the contract. He, considering it as a part of the policy, denies to it the effect of extending the policy beyond the time agreed upon in it for the payment of the premium; and although the article is part of the contract, yet he denies to the insured the right, under it, of claiming the insurance, by a tender of the premium within the fifteen days, and after the loss had happened. In this case, there is no reference to the printed article relied upon in the policy; it is no part of the policy, therefore. With how much greater force, then, do the principles ruled by Lord Kenyon, apply to this case. If the defendants could be made liable at all, upon the facts of this case, it strikes me that it could rest alone upon the idea, that the tender of the premium within the thirty days, is a new contract. This article contains no provision which allows the company to reject the tender, if made within time, and thus prevent a new contract upon the terms of the old policy. And if a tender of the premium had been made in this case, beyond the day of payment named in the policy, and before the expiration of the thirty days, the insured being in life, I should incline to the opinion that they would have been bound by it; but if made within the thirty days, the insured being dead, and the fact of his death known to the parties, there would be, in that event, no contract—no consideration for the insurance—no mutuality. It would be an act of mere fatuity, out of which no liability could spring. And if the fact of the death of the insured is known to the insurer, and its knowledge withheld from the insurers, and they accept the premium, the contract would be void for fraud. If known to neither party, it would equally be a void contract. There can be no valid contract for the insurance of the life of a dead man. See, in accordance with the decision in 5 T. R. S. C. 1 B. & P. 471. *Anstruther*, 707. 1 *Phil. Ins.* 30 to 34. *Douglass*, 12, note 4.

The case of *Schwin vs. James*, (6 East. 571,) relied upon by the plaintiff, does not sustain him. It refers to and sustains the doctrine settled in *Tarleton et al. vs. Staniforth et al.* The policy in the two cases was alike—in both, a reference to printed articles—in both, the same article as to extension of time—a loss after

The bill filed by Lewis Lamb charged, that in the land lottery disposing of the lands in Muscogee County, one Charles Whitlock was the drawer of lot No. 176, in the 6th district, who afterwards sold the same to William Crew, and that William Crew sold to complainant, who had remained in possession ever since; that upon the sale to Crew, Whitlock applied at the Executive and other Departments of the Government at Milledgeville, to obtain the grant, and was informed by the officers in charge of the same, that the grant had issued on the 1st day of July, 1829; and that Whitlock, on examination, found that the same was entered, as granted on that day, in the books of the Executive Department; that when complainant purchased, Crew produced a letter from John Bethune, then Surveyor General of the State, stating that the grant had issued on the day stated. As evidence that a grant had issued, the bill stated that the plat had been removed from among the plats of ungranted lots, and placed among those of granted lots, according to the custom of that Department. The bill charged that the entry in the Executive Department was not fraudulent, but was made, either when the grant actually issued, or by mistake; but that it appeared that the grant never had been recorded in the Secretary of State's office, as required by law.

The bill farther charged, that under the Act of 1845, disposing of ungranted lots, Lewis F. Harris had applied for and obtained a grant to this lot, for which he paid \$100; that Harris, at the time, knew of these mistakes, and that they had caused the grant not to be issued; that Harris had commenced an action of ejectment to recover the land, and that the same was pending on the appeal. The bill alleged a tender to Harris of the amount paid by him with interest, and offered still to pay it. The bill prayed a perpetual injunction.

On demurrer, the Court dismissed the bill, and this decision is alleged as error.

H. HOLT, for plaintiff in error.

JAS. JOHNSON, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We recognise the right of the citizen to be relieved against

No. 91.—ALFRED F. BRANNON, plaintiff in error, vs. HEZEKIAH NOBLE, defendant.

[1.] A holds a demand against B, and sues out process of garnishment against C, who is indebted to B by note, and obtains a judgment on the garnishment. D, who is the assignee of the note due by C to B, transferred to him after the service of the process of garnishment, institutes suit thereon against C, who pleads the judgment on the garnishment in bar: Held, that this cannot be done, and that a demurrer to the plea would well lie.

Assumpsit, in Muscogee Superior Court. Decision by Judge ALEXANDER, June Term, 1850.

H. Noble, as the indorsee of T. A. Brannon, brought suit on a note made by A. F. Brannon, due 1st December, 1846, and payable to the order of T. A. Brannon. To this suit A. F. Brannon pleaded former recovery, on a process of garnishment issued by a creditor of T. A. Brannon, and served on A. F. Brannon, on the 5th January, 1847. Subsequent to the service of the summons, T. A. Brannon had the note in possession, as stated by A. F. Brannon, in his return to the summons. To this plea, plaintiff below demurred, on the ground that it was insufficient in law. The Court sustained the demurrer, and defendant excepted.

H. HOLT, for plaintiff in error.

JAS. JOHNSON, for defendant in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] The demurrer to the plea, in this case, was properly sustained. We do not doubt but that the plaintiff in the judgment on the garnishment is entitled to collect it out of A. F. Brannon. His claim upon the money due to his debtor, and established by that judgment, is paramount to that of the plaintiff in this action. See *Glanton vs. Griggs*, 5 Geo. R. 436. But that is not the question made in this record. The question is, whether the judgment on the garnishment can be pleaded in bar of the action by the holder of the note, due by the defendant, in that judgment, to the debtor of the plaintiff in garnishment. To state the question with greater perspicuity: A holds a demand against B, and sues out

No. 92.—DOW, WILSON & HERREMAN, plaintiffs in error, vs. J. S. SMITH & Co. defendants in error.

- [1.] In order to sue out an attachment in behalf of a firm, one partner has the right to execute a *bond* in the name of the firm.
- [2.] A general judgment creditor cannot form an issue and traverse the truth of the affidavit of the attaching creditor, after judgment rendered on the attachment, and on a motion to distribute money belonging to the defendant.

Certiorari, Muscogee Superior Court. Decided by Judge ALEXANDER, May Term, 1850.

The questions in this case arose upon a motion to distribute money in the hands of the Sheriff, arising from the sale of the property of Birdsong & Sledge. Dow, Wilson & Herreman claimed as general judgment creditors. Jos. S. Smith & Co. claimed under a judgment on attachment of an older date. Counsel for Dow, Wilson & Herreman objected to the judgment of J. S. Smith & Co.—

1st. Because the attachment ~~ment~~ bond was not good and legal; because it was signed by one partner in the partnership name.

2d. Because a general judgment had been entered up on said attachment, and execution accordingly, instead of a judgment and execution *in rem*.

3d. Because there was no return by the officer, showing that he had advertised his proceedings according to law.

4th. Because the judgment was entered and ~~execution~~ issued before the debt was due.

The Court overruled the objections, and permitted counsel for Smith & Co. to enter a judgment *in rem, nunc pro tunc*, and to have execution instant; also, to prove by the levying officer, that he did advertise according to law. To which decisions, written exceptions were filed.

Counsel then tendered an issue, whereby they traversed and denied the truth of the ground of attachment alleged in the affidavit, viz: that Birdsong & Sledge were about to remove without the limits of the State, and demanded a Jury to try the issue. The Court refused the motion, and written exceptions to this decision were filed.

Upon these exceptions, a writ of certiorari was sued out to the

No. 93.—AUGUSTUS L. GRANT and another, plaintiffs in error vs.
NELSON McLESTER, defendant in error.

[L.] A agrees with B, that he shall have the deputation of the Clerkship of the Inferior Court, and receive for his compensation the fees and costs of the office already accrued and which are to accrue; and B agrees to pay A therefor, out of said fees and costs due and to accrue, the sum of five hundred dollars, and executes to A his notes to secure the payment of that sum: *Held*, that these notes are void as against the Statute forbidding the sale of public offices, and as opposed to the policy of the law.

Assumpsit, &c. and motion for new trial, in Muscogee Superior Court, May Term, 1850. Tried before Judge ALEXANDER.

N. McLester brought suit against plaintiffs in error on two notes of \$250 each, payable to McLester or bearer. Plea—that the notes were given for an illegal consideration, viz: the sale of the office of Clerk of the Inferior Court of Muscogee County, by McLester to Grant.

On the trial, the defendants proved that McLester was Clerk, and that Grant did all of the services, acting as Deputy Clerk, and receiving the costs. McLester told one witness he had nothing to do with the office, and told another that he had let Grant have the office, and Grant owed him \$500. To interrogatories exhibited to McLester, the plaintiff, he answered, that he appointed Grant as his Deputy, to take charge of and conduct the office; that about the time the notes were given, he was forced to leave the State for a time; that one W. B. Ector applied to him to appoint Grant Deputy; that he made out a schedule of the costs then due, amounting to \$1000 or \$1200, besides the accruing costs, and it was agreed that Grant should be appointed Deputy, and receive as his compensation, all of said costs—he, Grant, paying, or securing to be paid to McLester, out of, or as a part of said costs, and those accruing thereafter, the sum of \$500, and for this sum the notes were given. He denied that there was any sale of the office, or contract of sale. He admitted that he did require Grant to give him a bond with security for the faithful performance of his duties as Deputy Clerk.

Counsel for Grant requested the Court to charge the Jury, that if they believed that the notes were given for costs already

and profits of the office, it is good; but if the reservation or agreement is not to pay out of the profits, but to pay *generally a sum certain*, which must be paid at all events, it is void. *Godolphin vs. Tudor*, 2 Salk. 468. *Greville vs. Atkinson*, 9 B. & C. 462. 4 Man. & R. 372. *Chitty on Cont.* 721. According to this rule, how stands this case? Take it as most strongly made out by the evidence of the plaintiff himself, who was examined under our Statute. He testifies, "that he was Clerk of the Inferior Court of Muscogee County, and appointed the defendant his Deputy; that he exhibited to him a schedule of the cases pending and undisposed of in the Inferior Court, and upon which costs had accrued to the amount of one thousand or eleven hundred dollars, and upon which further cost was to accrue to an uncertain amount, and on the accrual of which, further clerical services were to be rendered. Upon this exhibition of cost and cases, it was agreed that he would appoint the defendant his Deputy, and give him for his compensation, said costs, which had and which were to accrue, he paying, or securing to be paid to him, out of, or as part of the said costs, the sum of five hundred dollars, to secure which, the notes sued on were given." The substance of which is, that the defendant was to take the office and its profits as Deputy, in consideration of which he undertook to pay plaintiff five hundred dollars out of the profits, and to secure which sum, he gave his notes. Although it seems to have been expressed in the agreement between these parties, that the five hundred dollars were to come out of the profits, yet the notes were given to secure it. The plaintiff did not rely upon the profits for his five hundred dollars, or upon the liability of the defendant to him, as trustee for that sum received to his use out of the profits, but he relied upon the defendant's express stipulation to make good to him that sum. What is this but a sale of the office for a sum certain to be paid, at all events, by his Deputy. The agreement indicates a well devised, but still insufficient attempt to evade the Statute. It is as much at war with its policy, as if nothing had been said about payment out of the profits, and it seems to me that the Court ought to have so instructed the Jury.

Contracts for the sale of public offices are void at Common Law, as being opposed to public policy, and may be resisted, although not embraced in any Statute; particularly, it would seem to me, such as relate to offices appertaining to or connected with the administration of justice. The public have a right to the ser-

Bears and others vs. Dawson.

Claim, in Muscogee Superior Court. Tried before Judge ALEXANDER, May Term, 1850.

This was an issue, formed upon a claim to a negro, interposed by John R. Dawson, as executor of John Crowell, deceased, to a negro boy levied on as the property of one John J. Wilson.

The evidence showed that the negro remained in the possession of Wilson about six months after the sale to Crowell; and then went into Crowell's possession, where he remained until Crowell's death. The letters testamentary of the claimant were not in evidence.

Plaintiff's counsel requested the Court to charge, that it was necessary for the claimant to introduce his letters testamentary, to make out his claim. The Court refused so to charge, but charged, that it was sufficient for the claimant to show title out of the defendant in execution. To which charge and refusal to charge, plaintiff in *fi. fa.* excepted.

Counsel for plaintiff in *fi. fa.* also requested the Court to charge the Jury, "that if they believed, from the testimony, that the negro boy remained in the possession of Wilson for six months after the sale, the sale was fraudulent and void against creditors, unless they believed the possession was explained by testimony." The Court declined so to charge, and plaintiff in *fi. fa.* excepted.

On these exceptions, error was assigned.

JONES, BENNING and JONES, for plaintiff in error.

W. DOUGHERTY, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] John R. Dawson claimed the negro levied on, as the executor of John Crowell, deceased, but failed to offer in evidence his letters testamentary. The Circuit Judge held, that this was unnecessary, and that it was sufficient to show title out of the defendant in execution.

So far as we are informed, the uniform practice in this State, under our claim laws, has been otherwise. The claimant makes oath that the property levied on is his. The object of this pro-

No. 95.—CHARLES CLEGHORN, plaintiff in error, vs. ALEXANDER J. ROBISON, defendant.

[1.] Plea, that defendant signed the note sued on as surety, and that it was agreed between him and his principal that another should sign it, also, as co-surety, before it was delivered, which was not done: *Held*, that this is not a plea of *non est factum*, and need not be verified.

Action on note, in Muscogee Superior Court. Decision by Judge ALEXANDER, May Term, 1850.

This was a suit against Alexander J. Robison, on a note made by one McNeil, and Robison as surety. Plea—that defendant signed the note by agreement with principal, that John Banks should sign the same as co-surety, before it was delivered to the payee, which he never did.

Plaintiff's attorney demurred to the plea, on the ground that it amounted to a plea of *non est factum*, and was not verified, as required by the Statute.

The Court overruled the demurrer, and this decision is excepted to as erroneous.

H. L. BENNING, for plaintiff in error.

JAS. JOHNSON, for defendant in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] The demurrer to this plea was properly overruled, because it is not, in our judgment, a plea of *non est factum*. What facts does it set forth? Why, that the defendant is surety on the note, and that when he signed it as surety, it was agreed between him and the principal, that one John Banks should also sign it as co-surety, before it was delivered, and that said Banks never did sign it, as agreed. This plea does not amount to a plea of *non est factum*. The liability of the defendant depends upon this agreement. If it was not carried out, he is not liable. The plea does not put in issue the execution of the note by the defendant. It in fact admits it, and sets up the agreement and the non-compliance with it, as a legal bar to recovery. It is not in denial,

W. B. Robinson & Co. having contracted to build a court-house in Randolph County, received from the Clerk of the Inferior Court promissory notes, payable to them or order, and signed by the Clerk, officially. These notes, shortly thereafter, were transferred, before due, to John Neal, who petitioned the Inferior Court to issue orders upon the County Treasurer, for the amount of the notes, in their stead; the Court refusing, Neal applied for and obtained from the Judge of the Superior Court, a *mandamus nisi*, requiring the Inferior Court to show cause why the orders were not issued. The Inferior Court, for cause, showed, among other things, that the consideration of the notes had entirely failed—the house built having “tumbled down,” and become utterly useless. The *mandamus absolute* was granted, and the orders issued accordingly.

On the 9th October, 1849, John Neal applied for a *mandamus nisi*, to be directed to Thomas Coleman, County Treasurer of Randolph County, requiring him to show cause why he should not pay over the amount due on the orders. To this, Coleman returned, that the consideration for which the orders were given had entirely failed—the court-house having fallen down, and become entirely useless.

Upon hearing the return, and inspecting the record of the former *mandamus*, the Court held the return to be insufficient, and that the matters in controversy had been previously adjudicated, or might have been adjudicated in the former case, and, therefore, granted a *mandamus absolute*.

To this decision, Coleman, as County Treasurer, excepted, and error has been assigned thereon.

TAYLOR, for plaintiff in error.

H. L. BENNING and H. HOLT, for defendant in error.

By the Court—LUMPKIN J. delivering the opinion.

[1.] The objection set up by Coleman, the County Treasurer of Randolph, to the payment of the orders held by Neal, is, that the consideration for which they were given, to wit: the building of a court-house for said county, has entirely failed—the court-house having fallen down, and become altogether useless.

In Equity, in Randolph Superior Court, motion to dissolve injunction. Decision by Judge WARREN, April Term, 1850.

On the 11th January, 1846, John H. Jones, then a citizen of Richland District, South Carolina, borrowed \$1200 of James S. Guignard, Jr. and gave to him a bond for the payment of the same, with William Geiger, Jr. Charles Neiffer, John H. Threewitt and William H. Cassin, as sureties. At the same time, Jones executed a mortgage on certain negro slaves, to indemnify his sureties (who were also his sureties on other claims,) from all liability on his account. Shortly thereafter, he removed to Randolph County, Ga. On the 17th February, 1849, Robert Joyner, as the assignee of the mortgagees, proceeded to foreclose the mortgage for \$1806 69, principal, and \$232 25, interest. Under the *f. fa.* issued upon this foreclosure, the Sheriff proceeded to levy and sell a portion of the mortgaged property. In February, 1850, John H. Jones filed a bill, charging the foregoing facts, and further, that at the time the money was borrowed, by agreement with his sureties, the money was placed in their hands, to be paid out to his creditors—the said Guignard discounting the notes at the usurious rate of 19½ per cent. interest per annum, and paying over to the sureties only the sum of \$975. The bill alleged that the sureties paid out only about \$500 towards the demands against Jones, and the balance was unaccounted for, except \$240, for which Charles Neiffer gave complainant a due bill; that the pretended payment by the sureties to Guignard, and assignment to Joyner, were merely colorable and fraudulent. The bill alleged that the poverty of complainant placed it beyond his power to pay the amount of \$500, admitted to be due before the sale, having none but the mortgaged property in possession. The bill prayed an account, from the sureties, of the money placed in their hands; that the due bill of Neiffer might be allowed as a set off to complainant—Neiffer acting as agent for the other sureties—or else might be allowed out of Neiffer's share, if he had any; also, an injunction to the Sheriff to restrain him from paying over any of the proceeds of the sale of the negroes, except the \$500 admitted to be due.

The defendant, Guignard, admitted the loan, but denied the usury, stating that he paid to Jones the full amount borrowed, (\$1200,) and that Jones handed him back as a *bonus* or commis-

ants. In every other particular, there is a remarkable antagonism between the bill and the answers. All cases like this require that the facts alleged, and the answers to the allegations, be stated, in order to an understanding of the judgment of this Court. The bill states that the complainant, being in debt, proposed to the defendants, that they stand his security for the loan of \$1200, which they consented to do, upon his executing to them a mortgage upon ten negroes. The bond of the plaintiff was accordingly executed, with the names of the defendants as sureties, and sold to Mr. Guignard at a discount at the rate of some 19½ per cent. each, for six hundred dollars, bearing interest from date; that a mortgage was executed to the defendants on the negroes, and delivered to them to secure them against liability on their suretyship; that the money raised by the loan was turned over to the sureties, with the understanding that they were, with it, to pay certain outstanding debts of the plaintiff; that after the execution of the mortgage, they consented to become his securities for certain other debts, not originally embraced in the mortgage, provided he would make upon it such an indorsement as would hold the mortgaged property liable as a security against their suretyship on these last named debts; that this was accordingly done. The counsel in the argument claims that when the notes were discounted to Guignard, there was an extra allowance to him of sixty dollars, as usury, which ought to be credited on the mortgage in favor of the plaintiff, because the sureties and mortgagees, with knowledge that this sum was allowed to the lender when the bonds were discounted, had paid to him, when they took up the bonds, their full value—the counsel holding that they ought to have defended against this usury, and failing to do it, they have no right to come upon him for remuneration. The bill farther states, that the defendants having received the money raised thus by the loan, have applied only some \$500 of it to the satisfaction of plaintiff's debts, and have not paid the other debts, which they assumed to pay for him, and which were embraced in the mortgage by the indorsement thereon; that one of the defendants, Neiffer, is indebted to the plaintiff on a note for \$240, given to him for so much of the money raised by the loan, and which was in his (Neiffer's) hands—the bill claiming a credit on the mortgage as against Neiffer for the amount of this note. The mortgage having been regularly fore-

Jones vs. Joyner and others.

whatever in the contract, but states, that after he paid the plaintiff the money, he handed him back \$60, as a commission or *bonus* for the loan, and that when these bonds both fell due, they were taken up by the defendants—they substituting their own obligations therefor.

Neiffer, one of the defendants, and also one of the sureties, answers, in addition to this joint answer with the others, that he was present when the bonds were sold to Guignard by the plaintiff; that Guignard paid to him for them, \$1200; "that is, to say, (to use the words of the answer,) he saw the said Guignard deliver to said Jones a check on the Commercial Bank of Columbia for \$1100, and pay him the sum of \$100 in cash; *that out of the cash thus received by said Jones, the said Jones returned to said Guignard the sum of \$60, as the said Jones said, for the accommodation of the loan.* Neiffer further, individually answering, says, "that the said John H. Jones, being indebted to him in the sum of \$240, and upwards, that is to say, (going on to specify the several items of the indebtedness,) the said Jones placed in his hands the sum of \$240, which, at the time, was supposed to be about the amount which the said Jones owed him, but not being prepared for a full and final adjustment and settlement of said accounts, he, the said Neiffer, executed the due bill for \$240, referred to in the bill, and delivered it to said Jones, as an acknowledgment that he had received that amount from him, to be applied to the above debts due by said Jones to him; and the said Neiffer avers, most positively, that such was the understanding of the parties at the time, and denies most positively that he received the said sum of \$240 for any other purpose whatever, or that he was, or is, in any wise indebted to said John H. Jones." Neiffer repeats, that the note was given simply as an acknowledgment of so much money received, as a matter of convenience, to be taken up upon final settlement with Jones, and says that in reference to that object, the note was drawn as it was—the negotiability being restrained.

These answers, so fortified and confirmed by each other, annihilate all the equity of the bill. Generally, then, I say, that the equity of the bill is sworn off, and the injunction was properly dissolved. The matter really requires no argument—the statements from the bill and answer are demonstration.

[2.] Respect to the counsel for the plaintiff in error, however,

negative the idea of any such contract. His testimony is, that the contract being executed without usury, Jones voluntarily returned to Guignard \$60, as he himself said, for the accommodation of the loan. There was no contract at any time about the \$60; Jones voluntarily moved to return \$60; Guignard passively received it. It was a gift which Jones had the right to make, and Guignard the right to receive.

The other point is in relation to the \$240 note. The bill claims that this is due to him by Neiffer, and ought to be allowed as an offset to Neiffer's claim on the fund as surety, raised on the foreclosure of the mortgage. But what does Neiffer say in his answer about this note? He says that he does not owe Jones anything; that aside from what Jones owes him as his surety, he is indebted to him in a considerable sum; that Jones, being indebted to him personally, and not as surety, paid him \$240 on account of that indebtedness; that it being inconvenient at the time to come to a final settlement, the note claimed by Jones to be due to him for \$240, was given as an *acknowledgment of that sum then paid, to be taken up upon final settlement.*

Let the Judgment be affirmed.

No. 98.—DAVID J. BOTHWELL and others, plaintiffs in error, vs. E. O. SHEFFIELD and others, defendants.

[1.] The sureties of a Sheriff, after recoveries have been had against them to the amount of their bond, may defend themselves at law against all pending or future suits on that ground.

In Equity, in Dooly Superior Court. Decision on demurrer, by Judge WARREN, May Term, 1850.

The bill in this case, filed by David J. Bothwell and others, as the securities of E. O. Sheffield, former Sheriff of Dooly County, alleged, that the amount of the bond was \$5000; that Sheffield and his Deputy collected, on sundry executions, an amount largely ex-

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ACT OF LEGISLATURE.

See Law, 2.

ADMINISTRATORS, EXECUTORS, &c.

1. Where the pleadings show assets in the hands of the executor, such assets are first liable for the payment of all legacies. *Demere et al. vs. Scranton et al.*..... 43
2. A sale of lands under a judgment, *de bonis testatoris*, against an executor, conveys a good title to the purchaser, and the title of the heirs is divested. *Doe, ex dem. Worthy vs. Hames*..... 236
3. Creditors and heirs, as a general rule, can only sue third persons through the representative of the estate. The exception is, where there is collusion, insolvency, unwillingness to collect the assets when called on, or some other like special circumstance. *Worthy et al. vs. Johnson et al.*..... 236
4. If heirs elect to set aside purchases made by executors, administrators, or guardians, at their own sales, they must go into Equity, and such sales are voidable only, and not *per se* void. *Ibid.*
5. The doctrine of *market overt*, in England, has not been generally recognized or enforced in this country. *Ibid.*
6. The doctrine of *market overt* applies to judicial sales, as well as to public sales made under authority of law by executors, &c; and caveat emptor is the rule of all such sales. *Ibid.*

14. An executor is not, ordinarily, liable for *assets* which come to the hands of his co-executor, or responsible for his *devastavit*. If he is, however, active in the matter, and by his action, whether intentionally or not, enables his co-executor to commit a *devastavit*, he will be liable with him for it. *Hall et al. vs. Carter and Kenan, executors*. 388
15. Each executor has power, under the will, to execute it; and one has no power to prevent the other from taking possession of assets, or to take them out of his possession after he has acquired possession. *Ibid.*
16. An inventory of notes and other *choses in action*, is not of itself evidence of assets in hand to charge an executor, but he will be liable for a *devastavit*, if he fails to collect such as are collectable with due care and proper diligence. *Ibid.*
17. If two or more executors join in a receipt for money, they are, by weight of authority in England, thereby jointly liable. *Quere*—as to this rule in the United States. *Ibid.*
18. A distinction taken between a joint receipt and the joint return of an inventory. *Ibid.*
19. An inventory of *choses in action*, is a requirement of law, obligatory upon all the executors who qualify; it does not of itself show *assets* in the hands of either, so as to charge them, nor does it show a joint possession of the evidences of debt, but leaves the fact of actual possession and control in any one or all, open to proof. *Ibid.*
20. Where there is a joint return of the inventory of debts; and the possession is in one, and he, through negligence, without participation by the other, fails to collect them, he is solely liable for such *devastavit*. *Ibid.*

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action; but if he adhere to the original cause of action, he may add a count substantially different from the declaration. *Ibid.*

3. In an action of trover against one, charging him, as trustee, &c. the plaintiff may amend by striking out the words "as trustee," &c. *Ibid.*

4. A plaintiff who has notice of a fatal defect in his declaration at the appearance term of the appeal, and makes no motion to amend until the second term, and when the cause is before the Jury, is too late, and cannot then amend. *Dorster vs. Arnold* 209

5. It is competent for all Courts to correct errors and mistakes in their own minutes, wherever the same is brought to their notice, provided the rights of third persons be not prejudiced. *Barefield vs. Bryan* 463

See *Equity*, 22, 23, 40. *Illegality*, 2. *Pleading*, 3. *Practice Superior Court*, 5, 6. *Practice Supreme Court*, 3, 4, 5. *Verdict*, 2.

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ANSWER.

See *Equity*.

APPEALS.

1. Where an appeal is taken from the Court of Ordinary to the Superior Court, under the Act of 1805, which requires the appellants to give security to the Clerk for all costs which may accrue by reason of such appeal: *Held*, that an acknowledgment taken by the Clerk that the appellants and their security were jointly and severally bound to the appellees for the payment of all costs which should accrue upon the appeal, in terms of the Stat-

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mission directs to be made in writing, under the hands of the arbitrators, should be under seal. *Ibid.*

5. It is not necessary to the validity of an award, that the umpire give reasons for his decision. *Ibid.*
6. When questions of law are distinctly submitted, the decision of the arbitrators will be final, unless it appear on the award that the arbitrators, intending to decide according to the law, have plainly mistaken what it is, and have acted on an erroneous rule of law. *Ibid.*
7. An umpirage will not be set aside in a case where the losing party was notified that the arbitrators had disagreed, and that the papers were in the hands of the umpire to decide, and when he was asked by the umpire if he desired him to re-hear the case, and he replied that he did not desire it, but was satisfied that he should proceed to determine according to the papers in his hands, on the ground that such party was not notified of the time and place of making, and was thereby denied the right of appearing, examining witnesses and submitting evidence. *Ibid.*
8. An award of lands is sufficiently certain, if it describe the land by metes and bounds, land-marks and contiguous possessions, accompanied with a plat. *Ibid.*
9. An award must generally cover all the matters submitted; but if the words of the award are not co-extensive with the submission, it will still be good, if it decides all the matters actually in dispute between the parties. *Ibid.*

ARTICLES OF SEPARATION.

See *Husband and Wife*, 4, 5, 6.

ASSIGNMENT.

See *Corporations*, 24.
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rested. It inures to his benefit, under the Statute of this State, by operation of law merely. *Ibid.*

BAILMENT.

1. A, as the agent of B, deposits a sum of money with C, with request that he will keep it until B returns home, (he being absent from the State,) and then pay it to him, which C agrees to do: *Held*, that C is a depository, and not liable to be sued by B for the money until after a request. *Montgomery, adm'r, &c. vs. Evans*..... 178

See *Rail Roads*, 1.

BANK BILLS.

See *Corporation*, 1 to 7. *Evidence*, 7.

BANKRUPT LAW.

1. Under the Bankrupt Act of 1841, when a discharge is sought to be attacked for fraud, a prior reasonable notice is required to be given, specifying the grounds of fraud; and the notice may be amended at any time before the final trial, provided a sufficient time elapse to enable the bankrupt to prepare to rebut it. *Flournoy vs. Newton*..... 306
2. The transfer of his effects by a bankrupt, in contemplation of bankruptcy, is a fraud upon the law. *Ibid.*
3. A bankrupt may appropriate so much of his effects as may be necessary to raise the means to maintain his application in bankruptcy. *Ibid.*

BANKS.

See *Corporation*, 1 to 29.

BASTARDY.

1. Bastards may be made legitimate and capable of inher-

8. The law, in its humanity, will not deny to those who have been the authors of their disgrace, the power to repair the mischief, as far as they can, by *gift, will or legislative enactment. Ibid.*
9. An Act, legitimating bastards, is purely *legislative* in its character, and not prohibited by the Constitution, and which should not only be supported, but construed favorably by the Courts. *Ibid.*

BILL OF EXCEPTIONS.

See *Practice Supreme Court.*

BOND.

See *Attachment, 2, 4. Sheriff, 7.*

BOOKS.

See *Evidence, 4, 5, 6, 21.*

CARRIERS.

See *Rail Roads, 1.*

CHARGE OF THE COURT.

1. It is error to instruct the Jury as to the law arising from facts which are not proven, and about which there is no evidence. *Bethune vs. McCrary*..... 114
See, also, *Montgomery, adm'r, &c. vs. Evans*..... 178
2. The Circuit Judge, in opening his charge to the Jury, said, "He wished counsel to take notice of his charge, for he supposed the case would be taken up, and if he erred, he could be corrected; and if the Jury found contrary to evidence, they could be corrected:" *Held*, that the remark relative to the Jury was improper, as tend-

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5. The claimant, under our laws, being entitled to the custody of the property in dispute, may contract with third persons as to the possession thereof, and such third persons will be answerable only to the claimant. But if the claimant be a *feme covert*, and incapable from such disability of interposing a claim, coming wrongfully by the possession herself, she can confer no rights on others. *Hardwick vs. Hook, receiver*..... 354
6. A claimant ~~cannot~~ set up an outstanding title in a third person, ~~to~~ defeat himself and defeat the plaintiff in *fi. fa.* *Beard et al. vs. Dawson, ex'r*..... 556

See *Evidence*, 1. *Fraud*, 5. *Judgment*, 4, 5.

CLERK OF COURT OF ORDINARY.

See *Constitutional Law*, 19 to 22.

COLLATERAL SECURITY.

See *Equity*, 32.

COMMISSION.

See *Constitutional Law*, 19 to 22.

CONSTITUTIONAL LAW.

1. In *England*, the sovereignty of the nation resides in the government; in this country, the supreme power is in the people. *Beall, adm'r, vs. Beall and Beall*..... 210
2. In *England*, the omnipotent authority of the Parliament is the dernier resort in all matters of difficulty and importance; in this country, the written Constitution. *Ibid.*
3. The General Assembly in this State has power to make laws and ordinances which they shall deem necessary

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11. The Constitution declares, that the three powers of the government, viz: the Legislative, Executive and Judiciary, shall be distinct; still the separation is not, and from the nature of the case, cannot be total. *Ibid.*
12. Whether the sanction of the Executive is necessary to an Act before it can become a law in this State? *Quere? Ibid.*
13. The Constitution might have conferred upon any one or more of these branches powers which, in their nature, would more appropriately have belonged to another. *Ibid.*
14. In the absence of any provision upon the subject, the power to legitimate bastard children, and to change the rules of inheritance, would belong, necessarily, to the Legislature. *Ibid.*
15. All departments of the government should be considered as equally honorable, useful, and patriotic; neither attempting to disparage or entertaining any undue sensitiveness or jealousy toward the other, nor suspect encroachments where none were intended. *Ibid.*
16. Measures, exclusively of a political, legislative, or executive character, are not examinable by the Courts. In such case, the remedy for any real or supposed abuse is solely by appeal to the people at the elections. *Ibid.*
17. The judicial authority is the final and common arbiter under the distribution of power by the Constitution, of all questions which, from their nature, require and admit of legal investigation and decision. *Ibid.*
18. The friends of republican government and public liberty have uniformly denounced and rebuked, in the strongest terms, the usurpation of judicial powers by the Legislature or Executive, as constituting the very essence of tyranny and despotic government. *Ibid.*

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2. Courts ought so to construe Statutes of Distribution, as would most likely effectuate the intention of the parties, had they died testate; *Beall, adm'r, vs. Beall & Beall.* 210

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CONTEMPT OF COURT.

1. Where a judgment of *ouster* had been awarded against P, on a *quo warranto*, who claimed to hold the office of Clerk of the Court of Ordinary, under an election made in January, 1849, and *subsequent* to the judgment of *ouster*, P was again elected to the same office by the Justices of the Inferior Court, and exercised the duties of the office under the *new* appointment, *exclusively*: *Held*, that P was not in contempt of the judgment of the Court upon the *quo warranto* removing him from office under the *first* appointment, the *new* appointment not having been declared invalid by any appropriate judicial proceedings instituted for that purpose. *Pyron vs. The State, ex rel. Lowe.* 230

CONTINUANCE.

See *Practice Superior Court*, 5, 6.

CONTRACT.

1. A agrees with B that he shall have the deputation of the Clerkship of the Inferior Court, and receive, for his compensation, the fees and costs of the office already accrued and which are to accrue, and B agrees to pay A therefor, out of said fees due and to accrue, the sum of five hundred dollars, and executes his note for that sum: *Held*, that these notes are void as against the Statute forbidding the sale of public offices, and as opposed to the policy of the law. *Grant and another vs. Mc Lester.* 558

See *Corporations, passim.* *Pleading*, 4.

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3. A suspension and failure to pay specie on demand to bill-holders, generally, is sufficient to enable the bill-holder to sue. He need not prove a special demand in his case. *Ibid.*

4. The right given the bill-holders to go upon the stock-holders for the ultimate redemption of the bills, is independent of any claim upon the assets of the corporation; one which may be asserted directly in his own name, and which the assignee or receiver could not enforce, as it constitutes no part of the effects of the bank. *Ibid.*

5. At Common Law, upon the dissolution, the debts due to and from it are extinguished. *Hightower vs. Thornton*..... 486

6. The individuals who compose a corporation, may, by contract or in law, incur liabilities, during its existence, which will survive the charter. *Ibid.*

7. Unpaid subscriptions to the capital stock of a corporation, are corporate property, which can be reached by the creditors in a Court of Equity; and this right exists entirely independent of any statutory provision. *Ibid.*

8. A Court of Equity will provide a remedy to enable the creditors to appropriate this trust fund. *Ibid.*

9. The doctrine of *Dr. Salmon's case*, (1 Cas. in Ch. 204,) questioned. *Ibid.*

10. Legislative Acts, as well as decrees of Courts of law, years, evince a sounder and purer morality with regard to the liability of moneyed corporations. *Ibid.*

11. It is the amount of shares subscribed, and not the sums actually paid in, which constitute the capital stock of a company. *Ibid.*

trust, not cognizable at law, is not subject to the provisions of the Statute of Limitations. *Ibid.*

21. The Legislature having recognized and ratified the appointment of an assignee, made by the stockholders before the forfeiture of their charter, the duty of calling in, in the unpaid stock to discharge debts devolves properly upon him. *Ibid.*

22. If he, fraudulently combining with the stockholders, neglects or refuses to do his duty, the proceeding may be maintained directly by the creditor, in his own name, against the stockholders, making the receiver a party defendant to the case. *Ibid.*

23. Creditors of an insolvent corporation, whose charter has been forfeited, and who have exhausted their legal remedies against it, may sue in Chancery for the assets of that corporation, and have them applied in payment of their debts. *Hightower et al. vs. Mustian* 506

24. An assignment of assets by a bank, (insolvent at the time, and about making a general assignment, and against which proceedings are pending to revoke its charter,) made to a creditor, cognizant of these things, and by collusion with him to defraud the other creditors: *Held*, to be void, and that the assets so assigned is a trust fund, to be applied to the payment of the debts of the corporation. *Ibid.*

25. A bill defective for want of parties, must generally be demurred to specially, and the demurrer must show who are the proper parties. *Ibid.*

26. A bill, by the creditors of an insolvent corporation, alleging a fraudulent combination and collusion between the assignee and debtor of the institution, to injure and defeat the creditors, makes a proper case for the interposition of a Court of Equity. *Stocks et al. vs. Leonard et al.* 511

CREDITORS.

See *Corporations, passim.*

CRIMINAL LAW.

1. When a Jury has been regularly drawn and summoned for the trial of a slave, charged with a capital offence, according to the Statutes of this State, such slave is entitled to be tried by such Jury, and the Justices of the Inferior Court have not the right, capriciously, to discharge such Jury, without some good and legal cause, and summon any other Jury for the trial of such slave. *Judge (a slave) vs. The State*..... 173
2. It is no objection to a Juror, drawn and summoned for the trial of a slave, who appeared and answered to his name, that the summons was left at his residence, and not served personally. *Ibid.*
3. It is no objection to a Juror, because there was a mistake as to his middle name, who appeared and answered, stating his right name. The mistake was properly corrected and the Juror impannelled. *Ibid.*
4. On the trial of a slave in this State for a capital offence, the warrant and preliminary proceedings had before the committing Magistrates, alleged in the indictment, ought to be given in evidence on the trial, so as to show that the Inferior Court properly had jurisdiction of the offence with which the slave is charged, *Ibid.*
5. Upon the trial of a slave for a capital offence, when the evidence on the part of the prosecution has closed, and the cause submitted to the Jury on both sides, further evidence cannot be admitted on behalf of the prosecution against the defendant. *Ibid.*
6. Where a Juror has answered negatively both of the

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DAMAGES.

See *Pleading*, 4.

DEED.

1. The Statute 32d Henry VIII. is of force in this State, and a deed made by an infant, while under age, will not be avoided by the execution of a deed after he arrives at the age of twenty-one, when the possession of the land is held adversely to him, but the latter deed will be void under the Statute. *Harrison vs. Adcock et al.* 68

See *Equity*, 32. *Will*, 6.

DEMAND.

See *Pleading*, 5.

DEPOSIT.

See *Bailment*, 1.

DEVISE.

See *Will*.

DISMISSAL OF SUIT.

See *Practice Superior Court*, 5. 6.

DISTRIBUTION OF MONEY IN COURT.

1. In the distribution of a fund before him, the Judge of the Superior Court acts upon equitable principles, but he can act only on a fund in hand, and confessedly for distribution. *Lowe et al. vs. Moore and another* 194

See *Attachment*, 5. *Judgment*, 4, 5.

7. A creditor may, in Equity, follow the assets of his debtor into the hands of a distributee, whether real or personal, and the Statute of Limitations will not give the distributee a title which will defeat the creditor's claim, but the creditor must sue upon his claim, within the statutory term applicable to it; if he does not, he will be barred, unless there is a reply to the Statute which will prevent its operation. *Ibid.*

8. A bill filed for the recovery of damages for the breach of a bond for titles, is a demand founded on a sealed instrument, and such a claim is not barred until twenty years after the accrual of the right of action thereon. *Ibid.*

9. The Judge of the Superior Court in Georgia, sitting as a Chancellor, has the power, exclusively, to administer the law. It is the province of the Jury to find the facts, and render a decree upon the trial on the merits, and in that point of view only, may they be considered in the light of Chancellors. *Williams vs. McIntyre, adm'r.* 35

10. The Court will dissolve an injunction on the coming in of the answer of the defendant, who alone is interested, negating all the facts and circumstances charged in the bill, and upon which its equity is based, though all the defendants have not answered. *Dennis vs. Green, adm'r.*..... 197

11. Where the answer of the defendant is made and sworn to before his death, it may be used on a motion to dissolve the injunction, though filed in Court subsequently. *Ibid.*

12. A bill may proceed without making the representatives of a mere formal party, parties to the proceeding. *Ibid.*

13. So, if the deceased was a necessary party to the final decree to be rendered, but not interested in the injunction.

to the knowledge of the wife, through the information of others, their affidavits should, if practicable, be filed with hers. If, however, she swears, *absolutely*, that he has threatened to remove, that is sufficient. *Ibid.*

19. A writ of *ne exeat* may be granted in this State, prior to any decree for alimony. The Court, in marking the writ, will exercise sound discretion, under the circumstances, so as to prevent oppression and extortion. *Ibid.*

20. Where any person is arrested by virtue of a writ of *ne exeat*, he may be discharged on giving bond, with good and sufficient security, either that he will not depart the State, or will pay the eventual condemnation money, or by showing that the writ ought not to have been granted. *Ibid.*

21. To a bill filed by executors, for direction in the execution of a will, and also asking to be protected against a contingent claim against the estate, set up by a third person, to certain property of the estate, through a title derived from others, and independent of the will, such third person is not a necessary party, and on demurrer, the bill, as to him, will be dismissed. *Bond and Pruitt, ex'rs, vs. Connelly*.....

22. The pleadings in Equity causes, pending on the appeal, are not amendable as a matter of course, but only by leave of the Court, on *special cause shown*. *The Georgia Rail Road & Banking Co. vs. Milnor & Co.*..... 313
See, also, *Boyd, adm'r, vs. Clements*..... 522

23. Where, upon *special cause shown*, the Court below, in the exercise of its discretion, allows an amendment, this Court reluctantly interferes to control that discretion. *Ibid.*

24. It is competent for Courts of Chancery to appoint a receiver, to institute suits in his own name for the re-

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32. If a bill is filed to enforce a parol agreement respecting lands, and the defendant, in his answer, admits the contract, without insisting on the Statute of Frauds, the Court will decree a specific performance, on the ground that the defendant has renounced the benefit of the Statute; *aliter*, if he insists upon the Statute in his answer. *Hollingshead, adm'r, vs. McKenzie*..... 457
33. Where a creditor receives a deed to a tract of land, as collateral security for the payment of a note which is to be given at a future time, and the creditor dies before the note is given, and the consideration of the deed thus entirely fails, it would be fraudulent in the administrator of the creditor to retain the deed, and Equity will order the instrument to be delivered up to be cancelled. *Ibid.*
34. A files his bill, charging that he is the owner of four shares in an estate represented by B; that he purchased property from a former representative of the estate, and gave his notes therefor, with an understanding that they should be paid, by allowing him the said shares; that judgment had been obtained on the notes, and praying an injunction of the judgment, and the execution of the agreement: *Held*, upon the answer distinctly denying that the estate owed the complainant anything, and stating that the four shares claimed in the bill had been paid to him, the injunction was properly dissolved. *Ford vs. Tyson, adm'r*..... 466
35. On a motion to dismiss a bill for want of equity, the question as to parties does not legitimately arise. *Hightower vs. Thornton*..... 486
See, also, *Hightower vs. Mustian*..... 506
36. A bill will never be dismissed for want of parties, when the proper parties can be made, either by amendment or supplemental bill. *Ibid.*
37. If it is apparent that parties cannot be made, and there can be no decree without them, the bill will be dismissed. *Ibid.*
See, also, *Hightower vs. Mustian*..... 506

ESTATES.

See *Will*.

EVIDENCE.

1. On the trial of the right of property, under our Claim Laws, the possession of the defendant in execution, after an absolute sale of the property, is *prima facie* evidence of fraud. *Carter vs. Stansfield*..... 49
2. The declarations of a party, while in the possession of property, as to the ownership, when against his interest, may be given in evidence against one who subsequently acquires a title from the declarant. *Maxwell vs. Harrison*..... 61
3. The admissions of a party, made under oath as a witness, or on a voluntary affidavit, may be given in evidence against him in a suit in which he is a party. *Ibid*.
4. To authorize a recovery upon shop books, where the entries are in the hand-writing of the party, the plaintiff, among other things, must prove by his customers that he kept correct books; and it is no compliance with the rule, for the witnesses to state that they considered their accounts reasonable; admitting, at the same time, that they had never examined the items, and could not say that the services charged were actually rendered. *Bower vs. Smith*..... 74
5. Before the books of the party can be admitted in evidence, they are to be submitted to the inspection of the Court, and if they do not appear to be a daily register of the business of the party, and to have been honestly and fairly kept, they are to be excluded. Explanatory evidence may be offered, and if the objections are *prima facie* accounted for, the books should be submitted to the Jury, letting the objections go, under the charge

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cution need not be proved to admit it in evidence, although the subscribing witness may be living. *Ibid.*

12. The declarations of a vendor, who has parted with the title to the property, are illegal when sought to be given in evidence against his vendee, unless it clearly appears such declarations were made while he was the owner of, or in possession of the property, at the time the declarations were made. *Ibid.*

13. A private Act of the Legislature, as to its facts and recitals, imports verity equally with the records of the Courts; still, it may be attacked for fraud in its procurement. *Beall, adm'r, vs. Beall and Beall*..... 210

14. The sayings of an agent, after his actings as agent, are not competent to prove his agency. *Colquitt vs. Thomas et al.*..... 258

15. Fraud cannot be presumed at law, but it may be proven by circumstances. *Ibid.*

16. Parol evidence is inadmissible to prove the contents of an execution and transfer, in writing, where both facts are material to the issue. *Flournoy vs. Newton*... 306

17. A decree in Chancery is evidence, not merely of the fact of its rendition, but also of all the consequences resulting therefrom. It may be given in proof against persons who were not parties to the bill in support of the plaintiff's right or title to sue. *Hardwick vs. Hook, receiver*..... 354

18. A naked trustee is a competent witness in an action to which he is not a party. *Ibid.*

19. The sayings of an attorney, who has sold a note belonging to his client, without authority, relative to the title to the note, not made at the time of the sale, are inadmissible in a suit between the purchaser and the true owner of the note. *Thomas, adm'r, vs. Kinsey*..... 421

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5. Where the release or dismissal of a levy on personal property—the judgment being unsatisfied—might not operate as a discharge of the execution between plaintiff and defendant, the effect might be very different where the rights of third persons were concerned, upon a proper case made. *Ibid.*

EXECUTORS.

See *Administrators, &c.*

FAILURE.

See *Corporation, &c.*

FORMER RECOVERY.

1. It is not enough that there was a remedy at law, to make the judgment at law a bar; it must be shown, not only that the matter alleged in the bill *might* have been set up, by way of defence, but that it would have been as practical and efficient to the ends of justice, and its prompt administration, as the remedy in Equity. *Hollingshead, adm'r, &c. vs. McKenzie*.....

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See *Equity, 44.*

FRAUD.

1. The pendency of suits against a debtor at the time that a purchaser buys land of him, is a badge of fraud, and a fact which the Judge is at liberty to consider in determining whether the purchaser bought with notice or not, under the Statute 12 Elizabeth. *Colquitt vs. Thomas et al.*.....
2. To subject land sold before judgment by the defendant to A, and by A to B, it is necessary that plaintiff prove that the defendant sold fraudulently, and that both A and B had notice of the fraud. *Ibid.*

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GOVERNOR.

See *Constitutional Law*, 19 to 22.

GRANT.

1. The Superior Courts of this State have the power to relieve a citizen against a grant which has been improvidently issued, upon a proper case made. *Lamb vs. Harris* 545
2. Where a party seeks to be relieved in Equity from the effect of a mistake, he must show due diligence on his part. *Ibid.*
3. A party who has obtained a grant to land under the Act of the General Assembly, passed in 1845, cannot be affected by the fraudulent conduct of the State House officers, unless he participated therein. *Ibid.*

HEIR.

See *Administrators, Executors, &c.* 2. *Constitutional Law*, 9. *Husband and Wife*, 1, 2. *Sheriff and Sheriff's Sale*, 4.

HUSBAND AND WIFE.

1. A husband may, by *deed* or *will* in his lifetime, deprive his wife of the whole of his estate except *dower*; so, also, he can procure an Act of the Legislature to be passed, limiting her right of inheritance after his death. *Beall, adm'r, vs. Beall and Beall* 210
2. No inheritance can vest, nor any person be the actual, complete heir of another, until the ancestor is dead. *Ibid.*
3. Where L. and T. executed a marriage settlement in
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ILLEGALITY.

1. Upon an affidavit of illegality to the execution, the validity of the judgment cannot be attacked. *Rogers vs. Evans* 143
2. Affidavits of illegality are, upon motion and leave had, amendable instant, by the insertion of new and independent grounds, provided the defendant will swear that he did not know of such grounds when the affidavit was filed. *Higgs vs. Hason* 317
3. Upon the trial of an illegality, the proof must be confined to the grounds taken in the affidavit. *Ibid.*

ILLEGITIMATES.

See *Bastardy*.

INCOME.

See *Tax and Tax Laws*, 1 to 7.

INFANT.

See *Deed*, 1. *Limitation of Actions*, 3, 4.

INJUNCTION.

See *Equity*, 3, 4, 5, 10 to 13, 27 to 31, 33, 45.

INSOLVENT DEBTORS.

See *Execution*, 1. *Fraud*, 5.

INSURANCE—LIFE.

1. An insurance office makes insurance of the life of A, at the instance of B. In the policy, it is stipulated that the

ed, by a person purporting to be the attorney of one of the parties, at the time of execution, the other party not being present: *Held*, that the interrogatories are defectively executed, and must be rejected. *Ibid*.

JOINT TENANCY.

See *Will*, 1.

JUDGMENTS.

1. The Act of 1822, which declares that "where an appeal is entered from the first verdict, the property of the party against whom the verdict is rendered, shall not be bound except from the signing of the judgment on the appeal, except so far as to prevent the alienation by the party of his, her, or their property between the signing of the first judgment and the signing of the judgment on the appeal," is intended only to prevent the alienation of property by the defendant pending the appeal to the injury of the plaintiff: *Held*, that under this Act, two judgments being obtained in favor of two plaintiffs at the same term, against the same defendant, upon one of which only an appeal is entered, and pending that appeal, the defendant aliens his property, which is finally brought to sale after a judgment on the appeal, the judgment on the appeal is not entitled to share in the distribution of the fund with the judgment at Common Law, upon which no appeal was entered. *Snelling vs. Parker and another*..... 121
2. The judgment of a Court that has no jurisdiction of a cause, is entirely void. *Rogers vs. Evans*.....
3. Where the Court has jurisdiction of the cause and parties, and only proceeds erroneously, the judgment, notwithstanding such error, is binding until it is vacated or reversed. *Ibid*.
4. A and B both have judgments open against C, and a fund raised from C's property is before the Court for

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5. A files his bill against B, who is a citizen of New York, setting forth an agreement by which B stipulated to give to A one-third of certain lands, to which B held the legal title, and prays an assignment of the one-third, and a conveyance by B to A. Service of the bill was perfected on B's agent in Georgia: *Held*, that upon this bill, a Court of Chancery could not decree against B, because of the want of jurisdiction over him. *Ibid*.

See *Judgment*, 2.

JURY.

1. The Act of 1805 changes the Act of 1799, only as to the mode of drawing Grand Jurors. Under both Acts, those remaining on the list, as made out from the tax books by the Clerk, constitute the Petit Jury. So that the Act of 1799 is in fact superseded both as to Grand and Petit Jurors, by the Act of 1805. *Malone, alias Hall, vs. The State*.....

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See *Criminal Law*, 1, 2, 3, 6. *Verdict*, 1, 2.

JUSTICES' COURT.

See *Claim*, 1.

LAND.

See *Decd*, 1. *Sheriff*, 1.

LAW.

1. Where the decisions of the Ecclesiastical Courts in England come in conflict with those of the Common Law and Equity Courts, on a question of property, the latter are the highest authority, and must prevail. *Chapman vs. Gray, executor*.....

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2. Where no time is fixed for the operation of a Statute, it

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Statute of Limitations has operated as a bar to the right of such executor or administrator to maintain an action therefor against one who has converted it, the right of the infant *cestui que trusts* of such executor or administrator will be also barred. *Ibid.*

5. If a party is to be constituted a trustee by the decree of a Court of Equity, on the ground of *fraud*, his possession is *adversæ* from the time the circumstances of the fraud were discovered. *Harrison vs. Adcock et al.* . . .

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6. The Statute of Limitations does not begin to run against express trusts created by the act of the parties or the appointment of law, so long as the trust continues, and is acknowledged to be a *continuing, subsisting* trust, for the reason that the possession of the trustee is the possession of the *cestui que trust*; but when the trust is denied by the trustee, and he claims to hold the trust funds or trust property as his own, adversely to his *cestui que trust*, the latter having knowledge of that fact, the Statute will begin to run in favor of such express trustee from the time of such adverse claim or possession. *Keaton vs. Greenwood*

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7. The Statute of Limitations will begin to run in cases of *implied trusts*, created by decree of a Court of Equity in favor of the trustee, from the time of his possession, as it would do in a Court of Law; for the reason, that his possession *never* was the possession of the alleged *cestui que trust*; the relation of *trustee* and *cestui que trust* never, in fact exists, until the decree of the Court establishing that relation. *Ibid.*
8. A bill filed for the recovery of damages for the breach of a bond for titles, is a demand founded on a sealed instrument, and such a claim is not barred until twenty years after the accrual of the right of action thereon. *Caldwell vs. Montgomery and Wife*

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9. When a creditor takes a mortgage to secure the pay-

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MORTGAGE.

See *Limitation of Action*, 9.

NE EXEAT.

See *Equity*, 17 to 20.

NEW TRIAL.

1. Where the Jury found a verdict for a greater amount of damages than was claimed in the plaintiff's declaration, and a motion for a new trial having been made on that ground, the plaintiff entered a remittiter on the record for the excess: *Held*, that the plaintiff had the right to enter such remittiter, and that a new trial on that ground ought to have been refused. *Griffin vs. Witherspoon* 113
2. Where, on the trial of a cause, a witness, from mistake, failed to prove a necessary fact, to make out the defence, the witness, having previously assured the defendant he could and would do so, whereby the defendant was prevented from procuring other testimony to prove the same fact, which could have been procured, and a recovery was had in consequence of such mistake of the witness and the jury: *Held*, that such mistake operated as a surprise to the defendant, and that a new trial should be granted, the defendant having shown upon the record a good and legal ground of defence to the action. *Wilson vs. Brandon & Shanhon* 136
3. Where the evidence is conflicting in regard to the main point in controversy between the parties, the admission of illegal evidence by the Court, which *might*, and probably did decide the question in favor of the plaintiffs, in the mind of the Jury, a new trial will be granted. *Settle vs. Allison et al.*

of the breach of the contract by the defendant. 2d. He may wait until the termination of the period for which he was employed, and then sue upon the contract and recover his whole wages. 3d. He may treat the contract as rescinded, and may immediately sue on a *quantum meruit* for the work and labor he actually performed. *Rogers vs. Parham*.....

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PARTNERSHIP.

1. Upon an agreement between A and B, that A should take certain negroes of B, and work them in a blacksmith shop, furnish all supplies, pay all expenses, and give B one half of the nett proceeds of the shop for the use of the negroes: *Held*, that as to third persons, A and B are partners. *Buckner vs. Lee et al.*.....
2. If the business of a firm is conducted by one of the partners, and his name is the name of the firm, and a note is made by that partner in his name, the firm is liable thereon, if it is proven that the note was made as a note binding the firm, or that the consideration of the note was for the benefit and in the course of business of the firm, and that the payee believed these things, and the maker sanctioned his belief by his acts and representations. *Ibid.*
3. If money is borrowed, or a purchase made by an individual member of a partnership, and his note is given therefor, it is, *prima facie*, the debt of the individual; but the holder, in an action against the firm for the consideration of the note, may rebut this presumption by proof, and if it appear that the credit was given to the firm, and not the individual, if the money or the property went to the use and in the course of business of the firm, it will be liable. If, however, the credit was given to the individual, the firm will not be liable, although the money or property went to the use, or in the course of business of the firm. In that case, it will be

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have not been appropriated, without specifying what they are, is demurrable for uncertainty. *Lane vs. Morris* 468

7. Plea, that defendant signed the note sued on as surety, and that it was agreed between him and his principal that another should sign it as co-surety before it was delivered, which was not done: *Held*, that this is not a plea of *non est factum*, and need not be verified. *Cleg-horn vs. Robison* 559

See *Bail*, 1. *Jurisdiction*, 5.

PRACTICE SUPERIOR COURT.

1. In all applications for a new trial in the Superior Courts, a brief of the testimony in the cause must be filed by the party applying for a new trial, under the revision and approval of the Court, at the term at which the application is made, in conformity to the 61st Common Law Rule of Practice, and the fact must be evidenced in writing. *Tomlinson vs. Cox* 111
2. A brief of the testimony which refers to executions, judgments and interrogatories, as being attached, when in fact no such papers are appended, is fatally defective; and the omission cannot be supplied by the certificate of the presiding Judge, that he recognizes such documents as in Court before him, on the final hearing of the motion. *Ibid*.
3. The best mode of making out the brief of the testimony, is to embody in it an abridged statement of the oral and a copy of the written evidence. *Ibid*.
4. The question discussed, whether under our Statute, where the defendant, upon a plea of set off, recovers a balance against the plaintiff, the plaintiff has a right, on the appeal, to dismiss his action, so as to defeat the judgment. *Attaway, vs. Dyer et al.* 184

parties; and allow no discretion in relieving them from the failure to exercise it. *Ibid.*

5. Under the Act of February, 1850, all defects in the bill of exceptions, writ of error; and citation, may be amended instanter, and without costs, in conformity with the record of the cause below. *Higgs vs. Huson*..... 317
6. A copy of the writ of error must be served as required by the rule; this right may be waived. *Chapman vs. Gray, ex'r*..... 337
7. The Court will not entertain an argument to screen a party failing to comply with the rules, by showing the rule itself to be inexpedient. *Ibid.*
8. The rules of the Supreme Court are the law of the Court until repealed, unless they are repugnant to the Constitution and Statutes of the State. *Ibid.*
9. After a bill of exceptions has been signed and certified by the Judge of the Superior Court, and filed with the Clerk, his control over it is at an end. *Heard vs. Heard*..... 380
10. Under the Acts of 23d February, 1850, the original bill of exceptions must remain in the Clerk's office below, and a copy transmitted to the Supreme Court, as a part of the transcript of the record, or accompanying the same; and if this is not done, the cause will be stricken from the docket. *Ibid.*
11. The Act of 23d February, 1850, allowing the copy to be made out and sent up with the transcript *on or before the first day of the term*, would seem to repeal that provision of the Act of 1845, requiring the transcript to be sent up within ten days. *Ibid.*
12. An application for a certificate to prevent damages being assessed under the Act of 1845, creating the Su-
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- young Court will not be heard after the term at which the case was returned. *Taylor vs. Callahan*..... 436
11. Where the Clerk of the Superior Court sent up the original instead of a copy of the bill of exceptions: *Held*, the case cannot be set aside but be relieved by suggesting a ~~dismissal~~ *dismissal* of the record. *O'Neil and another vs. O'Neil*..... 439
- M. Query**—as to construction of the rule allowing ~~dismissal~~ a suggestion of dismissal of the record.
Id.

PRINCIPAL AND AGENT.

See *General* 1.

PROMISSORY NOTES.

1. The payment of a note after due from an indorser who has paid it cannot recover out of a prior indorser any more than as vendor paid upon it. *Bethune vs. McLean*..... 114
2. The running of the name of a surety to a joint and several note, with the consent of the payee, is not such a material alteration as will invalidate it. *Broughton, adm'r, vs. West*..... 248
3. One who buys a note, bill, or other negotiable security, bona fide, and for value, after it is due, from one who has no title to it, acquires no title against the true owner. *Turner, adm'r, vs. Kasey*..... 421

See *General* 1. *Evidence*, 19. *Pleading*, 1, 2. *Recorder*, 2.

PURCHASER.

See *Equity*, 16. *Executors. Administrators, &c.* 7 to 12. *Fraud*, 1 to 4. *Notice*, 1. *Promissory Notes*, 3. *Sheriff and Sheriff's Sales*, 1.

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RECORDS.

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REMAINDER AND REMAINDER-MEN.

1. A remainder in slaves cannot be created by parol. *Maxwell vs. Harrison*, 61.
2. A limitation of a promissory note in remainder, by deed or will, is valid. *Broughton, adm'r, vs. West*..... 248

See *Equity*, 26. *Will*, 1.

RETROSPECTIVE LAWS.

1. Are forbidden by the first principles of justice. *The Mayor &c. vs. Hartridge*..... 23

RAIL ROADS AND RAIL ROAD COMPANIES.

1. The Macon & Western R. R. Co. took on board their cars the slave of H, having a general pass, and without the knowledge and consent of H, to transport him to a given point, for the usual fare for negroes: *Held*, that this was a conversion of the slave, and that the company are liable for all the injuries which he received, whether they occurred by the negligence of the company or otherwise. *The Macon & Western R. R. Co. vs. Holt*.... 157

SALE OF OFFICE.

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- and the title of the heirs is divested. *Doc, on dem. Worthy vs. Hames*..... 234
5. Where property of a defendant in execution is seized and sold by the Sheriff, there is no warranty of title on the part of the defendant in execution or the Sheriff. The maxim of *caveat emptor* applies. *McWhorter, adm'r, vs. Beavers*..... 300
6. The ordinary returns of a Sheriff on process in his hands are not traversable. *Higgs vs. Huson*..... 317
7. The sureties of a Sheriff, after recoveries have been had against them to the amount of their bond, may defend themselves *at law*, against all pending or future suits on that ground. *Bothwell et al. vs. Sheffield et al.*..... 569
- See *Administrators, Executors, &c.* 7, 8, 9.

SLAVES AND FREE PERSONS OF COLOR.

1. The black color of the African race is *prima facie* evidence of slavery. *The Macon & Western R. R. Co. vs. Holt*..... 157
2. A permit or ticket to a slave must specify the length of time that he is to be absent, and the places which he is allowed to visit. *Ibid.*
- See *Criminal Law*, 4, 5, 8, 9, 10. *Rail Roads*, 1. *Warranty*, 1.

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See *Construction of Statutes. Law*, 2.

STATUTES OF FORCE.

See *Deed*, 1.

7. In laws imposing taxes, if there be a real doubt whether the intention of the Act was to levy the tax, that doubt should absolve the tax payer. *Ibid.*
8. Taxes due the State are a general lien upon all the property of the debtor, attaching on the 1st of January of each year. *Doe, ex dem. Gledney vs. Deavors*, 479
9. Where property liable to tax is sold, under execution, between the 1st of January and the giving in of the same, and is afterwards sold under execution to pay the tax due by the defendant in *fi. fa.*: *Held*, that the purchaser at the Tax Collector's sale gets a good title. *Ibid.*

TESTAMENTARY PAPER.

See *Wills*, 6.

TREASURER.

See *County Treasurer*.

TRESPASS.

See *Equity*, 3, 4, 5.

TROVER.

See *Conversion*, 1, 2, 3.

TRUST AND TRUSTEES.

See *Amendment*, 3. *Corporations, passim.* *Equity*, 2, 16. *Evidence*, 18. *Limitations of Actions*, 4, 5, 6, 7.

USURY.

1. If a surety to an usurious contract pays usurious inter-

breach of warranty of the soundness of negro children whose mother was proven to have died of consumption, it is necessary to show either that the disease was hereditary in the family, or that the children were born subsequent to the actual existence of the complaint in the mother. *Dean vs. Traylor* 169

WILL.

1. Where a testator made the following bequest—"I lend the following negroes, (naming them) with all their increase to A, B and C, children of my first wife, this loan to continue during their natural lives, and at their death the property to be equally divided among the children of A and B, and in the event of C's having child or children, they also to have one third part; but if C dies childless, the whole then shall go to the children of A and B. It is my desire that John, one of the negroes mentioned in this article, should go into the possession of A, and be considered so much of her part. It is my desire also, that no part of the above mentioned property should come into the hands or possession of the husband of C, but it shall be held by A and B, and go to their children, if her husband survives C." *Held*, on a bill filed by one of the children of A, for a distribution of the property in the life time of B, that it was the intencion of the testator that his three daughters should hold the possession of the life estate in the property during their joint lives or the life of the survivor, and that the grand-children of the testator were not entitled to a distribution until the death of the last surviving daughter. *Riordon, guardian, vs. Holiday et al.* 79

2. A testator bequeathed as follows: "I farther will that one hundred dollars *per annum* be paid out of the profits of said bakery to B. Moore, of the city of New York, for the use of my mother, Mrs. Elizabeth Wagner and also the like sum of one hundred dollars out of said profits to my sister, Mrs. Margaret Williams, together with eighty dollars lent by her to me in New

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erty:" *Held*, that the daughter took a life estate, and her children a remainder, as purchasers, and not by descent. *Kemp, adm'r, vs. Daniel, pro adm. &c*..... 385

2. An instrument by which A conveys certain negroes to B, with this condition: "Nevertheless, I (the donor) have the full use of said negroes during my natural lifetime, and at the time of my death, the said negroes and their increase shall rise and become the property of the said B:" *Held*, to be a will and not a deed. *Gray vs. Rawlins*..... 450

WITNESS.

See *New Trial*, 2. *Evidence*, 18, 20.

